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Water Law

in

Canada

The Atlantic Provinces



G. V. La Forest and Associates

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WATER LAW IN CANADA
—THE ATLANTIC PROVINCES—

by

Gerard V. La Forest, Q.C., and Associates

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To Marie and Girls

PREFACE

In April, 1967, the Atlantic Development Board asked me to prepare a comprehensive analysis of the legal framework of water resources in the Atlantic Provinces. The work was one of a series dealing with water demand and supply in the Atlantic Provinces of Canada, and with existing legal and administrative frameworks relevant to water resource development.

The major portion of the work, consisting of three volumes entitled *Water Resources Study of the Atlantic Provinces—The Legal Framework*, was published in the latter part of 1968. A fourth volume, comprising an appendix dealing with regulations, orders in council, by-laws and other subordinate legislation, was published in 1969. It was later decided that the work should be prepared in a more durable form, and I undertook to do this for the Department of Regional Economic Expansion early in 1970. I took the opportunity not only to bring the study up to date, but to make some organizational changes. In particular, it was divided into chapters and a table of cases and an index were prepared. In this revision, I have omitted the appendix, as being of less general interest, but I have incorporated some of the more important parts of it in the work.

As already mentioned, the study is intended to give a comprehensive analysis of the legal framework of water resources in the Atlantic Provinces. As in any practical undertaking, however, the term "comprehensive" has had to be interpreted in a reasonable manner, both in determining the scope of the study and the sources of research material.

In so far as the scope of the study is concerned it is limited to water as a resource; for example, the use of water for consumption, for irrigation, or for the generation of power fall clearly within the terms of reference. So, too, activities affecting the quantity or quality of water, e.g. pollution, come within the study. But activities having only an incidental connection with water, for example, distribution of electric power, are not covered by the study. Sometimes the line is hard to draw. Thus navigable waters are covered in the study, but navigation and shipping are not. Similarly fish and their ownership receive attention, but fishing as an activity is not within the scope of the study. Even when these distinctions are drawn, however, exceptions are made where necessary to give a balanced view of water law. Thus while navigation and shipping are generally excepted, it is necessary to deal with navigation to some extent in understanding the law of navigable waters. In constitutional matters, it is also necessary to go even further afield. For in determining the division of governmental power in so far as it affects water, something must be known not only of powers like fisheries and navigation and shipping, but also of such matters as the spending and lending powers and Indian lands. But the focus of attention is always on water as a resource.

The second manner in which comprehensiveness had to be interpreted was in determining the material consulted. In so far as the framework of legal resources is based on the common law, a balance had to be struck between reading only the

cases decided in the Atlantic Provinces or all those decided in the common law world. The first alternative is too narrow as not providing a sufficient body of experience, the second, practically impossible, and on many points, misleading. The course chosen was to study all Canadian cases on the matter. In one area—surface and ground water—however, it was felt that Canadian cases did not provide a sufficient body of experience and English cases were freely examined. In other areas of the law, such as the law respecting rivers, lakes and streams, English cases, though useful, are at times misleading.

In the constitutional field, all Canadian cases were studied if the subject matter was felt to be substantially connected with water resources.

Finally, an attempt was made to examine all the statutes, both public and private, and the regulations and orders in council, as well as many of the municipal by-laws and ministerial regulations of the federal government and the four Atlantic Provinces. The importance of the legislation determined the degree of exhaustiveness of the study. For example, statutes such as the Navigable Waters Protection Act and the water authority Acts receive very close attention, but private Acts governing some local activity are only examined in a general way.

The study is divided into the following parts:

- Part I —The Constitutional Position
- Part II —The Administrative Framework
- Part III —Rivers, Streams and Lakes
- Part IV —Interprovincial Rivers
- Part V —International Rivers
- Part VI —Surface and Ground Water
- Part VII—Coastal Waters

The reasons for these divisions are as follows. The basic framework of water resources was developed by the English courts, and later adopted and modified by Canadian courts, in settling individual disputes over the centuries. This is the common law background. In doing this the courts made a number of basic distinctions, between water in determinate bodies of water such as rivers, streams and lakes, surface water, ground water, and to a lesser extent coastal waters. These matters are largely dealt with in Parts III, VI, and VII.

The common law was, however, modified from time to time by statute. In Canada this raises constitutional problems of determining which level of government, federal or provincial, has power to modify or replace existing doctrine. These questions are dealt with in Part I. Many of the statutes simply modified the law *ad hoc* to accommodate particular needs, but there has been a growing tendency for legislative schemes to replace many areas of the common law. This has been accompanied in recent years by a rapid growth in administrative structures to control the development of, and to protect water resources. The statutes are dealt with following the appropriate common law classifications, but the administrative structure is dealt with separately in Part II.

Finally some rivers and streams fall within more than one jurisdiction. Accordingly Part IV and Part V deal with interprovincial and international rivers, respectively.

As already mentioned the study was one of a series commissioned and financed by the Atlantic Development Board. A federal-provincial supervisory committee assisted in the collection and evaluation of data. The committee included representatives of the Provinces of Newfoundland and Labrador, Prince Edward Island, New Brunswick and Nova Scotia and the federal Departments of Energy, Mines and Resources, Fisheries, Finance, Forestry and Rural Development, and Health and Welfare; some of the federal members are now with the Department of the Environment. I would like to express my appreciation for the assistance of the committee. More particularly I would like to convey my thanks for the helpfulness displayed throughout by J. R. Lane, then of the Planning Branch of the Atlantic Development Board, and now of the Department of Regional Economic Expansion, and David W. Ross, Vice-President of Hedlin Menzies & Associates Ltd., Vancouver (who was a special consultant to the supervisory committee and responsible for co-ordinating this study with the engineering and administrative studies). I should also like to express my thanks to Dean William F. Ryan, Q.C., of the Faculty of Law of the University of New Brunswick, who kindly gave me permission to undertake this study while I was a Professor of Law there and to use the facilities of the faculty.

The work was accomplished by a team consisting of my colleagues on the Faculties of Law at the University of New Brunswick and at Dalhousie University and by graduates of both faculties. I, of course, planned, organized, and edited the work, and for it I must bear the entire responsibility, but so far as it has merit, the credit must be shared with my associates and with the law schools they represent.

At the University of New Brunswick, I had the benefit of the assistance of Professor Alan D. Reid. Assisting us in gathering information respecting federal and New Brunswick legislation were Charles S. Shannon, Mrs. Mildred B. Hilborn, and John G. Bryden, all former law students at the University of New Brunswick. At Dalhousie Law School my associates were Dean W. A. MacKay, Professor W. R. H. Charles, and Professor T. W. Somerville. They were assisted by the following team: Ian A. Blue, Brian D. Bruce, Mrs. Lucille Kerr, and Kenneth A. McInnis. All are former students at Dalhousie Law School with the exception of Mrs. Kerr who is a graduate of the Faculty of Law of the University of New Brunswick. The information respecting Prince Edward Island was collected by a Dalhousie Law School graduate, George Mullally. In Newfoundland the information was gathered by Barry R. Sparkes, and David Day. The former is a graduate of the Faculty of Law of the University of New Brunswick; the latter, of the Dalhousie Law School.

I will now set out how the work was apportioned between myself and my colleagues. I personally did the work on the constitutional position, the common law (except that related to surface and ground water), interprovincial and international rivers, the Navigable Waters Protection Act and the right of floating in Newfoundland. I also wrote a substantial part of the final version of the Nova Scotia and Newfoundland material. Professor Reid wrote the various sections dealing with the federal, New Brunswick and Prince Edward Island statutes and the common law dealing with surface and ground water. He was also invaluable to me in arranging for the typing and printing of the work in its later stages. A

team under Dean W. A. MacKay wrote preliminary drafts of the study dealing with the Nova Scotia legislation. Mrs. Kerr was especially helpful in preparing the revision. Professor Charles wrote preliminary drafts and some of the final drafts of the Newfoundland legislation. Where the work can be attributed solely to one contributor, I have done so in the chapters.

In order to complete the work within the shortest possible time, my method was to delegate the work with fairly general and flexible instructions respecting the organization and the manner of referring to authority. As might be expected of a study involving work in four provinces (indeed six, for part of the work had to be done in Ottawa, and during the latter stages I was Dean of Law at the University of Alberta), there are at times minor variations in style and format. Whatever merit it may have, the work is the most ambitious study of the legal framework of water resources yet completed in Canada. The personnel of the Atlantic Development Board who conceived the project are to be congratulated on their initiative in having this, and the complementary engineering and administrative studies, undertaken.

Gerard V. La Forest, Q.C.
Stanhope, P.E.I.

July 31, 1970

The Revised Statutes of Canada, 1970 were published after the completion of this study, but I have made the appropriate references to them in the main body of the work. I have also prepared an addendum of the statutes passed up to the date noted below, dealing specifically with water, and have made reference in the footnotes to some new material.

I should also add that the chapter on interprovincial rivers has already been published in somewhat modified form in the March, 1972, issue of the Canadian Bar Review, at pp. 39-49. I am grateful to the editor, Dr. J. G. Castel for his permission to republish it here.

April 30, 1972

G. V. La F.
Ottawa

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PART I

The Constitutional Position

CHAPTER ONE

The Constitutional Position

By Gerard V. La Forest

INTRODUCTION

Background

So much is heard of the division of legislative power in Canada that one is inclined to think of the Canadian constitution almost solely in terms of the British North America Act. But the fundamental structure of our legal system is much more complex than this simplistic picture, and can perhaps best be understood by approaching it historically.

When the British settlers came to the colonies now comprising the Atlantic Provinces, they brought with them so much of English law as was suitable to their situation and condition.¹ The bulk of English law relating to water consisted of the common law, that body of rules and principles developed by the English courts over the centuries in settling disputes between individual litigants. In addition, there were the statutes—in the field of water law these were not numerous—of the British Parliament that had added to, modified or abolished parts of the common law, or introduced wholly new legislative schemes. The common law, as applicable, together with British statutes modifying it, therefore, were the legal materials used by the early courts in the colonies as a guide in settling disputes between litigants. In each of these colonies, legislatures were established, and these too enacted legislation adding to, modifying or abolishing the previous law, or introducing wholly new law.

This was the background against which the British North America Act, 1867, and subsequent constitutional statutes were passed. The Act did not abolish the previous law; in fact, provisions were made to continue it.² The major purpose of the Act was to divide between the two levels of government, the federal and provincial, the power to make new laws, which, of course, included the power to alter and amend old ones as well as to introduce completely new legislative schemes. These areas of jurisdiction overlap to a considerable degree, so that on many subjects both the federal Parliament and the provinces may legislate. Where there is conflict, however, federal law prevails.³ If the federal Parliament or a provincial

1. *Doe d. Hannington v. McFadden* (1836), 2 N.B.R. 153; *Kielley v. Carson* (1842), 4 Moo. P.C. 63; 13 E.R. 225; *Uniacke v. Dickson* (1848), 2 N.S.R. 287.

2. British North America Act, 1867, 30 & 31 Vict., c. 3, s. 129.

3. For a brief discussion of paramountcy, see Laskin, *Canadian Constitutional Law*, 3rd ed. (Toronto, 1966), pp. 104-11; for more detailed discussions, see Lederman "The Concurrent Operation of Federal and Provincial Laws in Canada" (1962-3), 9 McGill Law Jo. 185; Laskin "Occupying the Field: Paramountcy in Penal Legislation" (1963), 41 Can. Bar Rev. 234. For problems of paramountcy relating to water law, see Henry Landis, "Legal Controls of Pollution in the Great Lakes Basin" (1970), 48 Can. Bar Rev. 66.

legislature passes a law outside its given areas of jurisdiction, it will be declared *ultra vires* on being questioned before the courts.

One more general point should be made of the role of the courts. In the preceding statement, the common law was referred to as a set of rules and principles guiding the courts. This gives an impression that the law is static. In truth, it is more accurate to speak of the common law as a process by which courts decide claims made before them not only on the basis of existing decisions but in the light of current societal needs. In a word, the courts are forever modifying the common law to adapt it to the changing needs of society. In doing this the courts are not hindered by any division of power. Modifications to the English common law relating to water, especially water flowing in rivers and lakes, have been especially numerous. The courts took advantage of the fact that the common law applies only as applicable to the local situations and conditions to develop new doctrines, such as the public right to float logs in New Brunswick, and, in certain parts of Canada at least, to modify existing doctrines, for example, the application of the public right of navigation to all waters *de facto* navigable, not only to tidal navigable waters. The division of power operates in the legislative and executive fields, not to courts applying the common law. Finally, it should also be observed that constitutional interpretation is also modified over time to adjust the constitution to changing times.

Relevant Provisions of the British North America Act

All but a few of the legislative powers given to the federal and provincial governments under the British North America Act may in some way or other affect the development of water resources, but only the more relevant ones can be discussed in any detail. The more important may here be reproduced:

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,—

.

1A. The Public Debt and Property.

2. The Regulation of Trade and Commerce.

.

9. Beacons, Buoys, Lighthouses, and Sable Island.

10. Navigation and Shipping.

11. Quarantine and the Establishment and Maintenance of Marine Hospitals.

12. Sea Coast and Inland Fisheries.

13. Ferries between a Province and any British or Foreign Country or between Two Provinces.

.

24. Indians, and Lands reserved for the Indians.

.

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,—

5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
.
8. Municipal Institutions in the Province.
.
10. Local Works and Undertakings other than such as are of the following Classes:—
- (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;
 - (b) Lines of Steam Ships between the Province and any British or Foreign Country;
 - (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
11. The Incorporation of Companies with Provincial Objects.
.
13. Property and Civil Rights in the Province.
.
16. Generally all Matters of a merely local or private Nature in the Province.
.

95. In each Province the Legislature may make Laws in relation to Agriculture in the Province . . . ; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces; . . . and any Law of the Legislature of a Province relative to Agriculture . . . shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.
.

108. The Public Works and Property of each Province, enumerated in the Third Schedule to this Act, shall be the Property of Canada.

109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.
.

117. The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the Right of Canada to assume any Lands or Public Property required for Fortifications or for the Defence of the Country.
.

132. The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.

.

THE THIRD SCHEDULE.

Provincial Public Works and Property to be the Property of Canada.

1. Canals, with Lands and Water Power connected therewith.
2. Public Harbours.
3. Lighthouses and Piers, and Sable Island.
4. Steamboats, Dredges, and public Vessels.
5. Rivers and Lake Improvements.

.

10. Armouries, Drill Sheds, Military Clothing, and Munitions of War, and Lands set apart for general Public Purposes.

The British North America Act, 1867, originally applied to New Brunswick and Nova Scotia, but its operation was extended to Prince Edward Island and Newfoundland by the Terms of Union with those provinces.⁴ Newfoundland has its own provisions (Terms 33, 35 and 37) for sections 108, 109 and 117, but they are virtually identical except that the properties conveyed to the Dominion by Term 33 are not identical with those in the Third Schedule. The relevant properties listed in Term 33 are the wharves and drydocks of the Newfoundland Railway, public harbours, wharves, breakwaters, aids to navigation, naval property, and public dredges.

Basis of Federal Power

General

The principal basis for federal legislative power over water management may be found in the following provisions:

- | | |
|---|--|
| (1) Section 91 (preamble and conclusion)— | Peace, Order and Good Government |
| (2) Section 91 (1A) | —Public Property |
| (3) Section 91 (7) | —Defence |
| (4) Section 91 (10) | —Navigation and Shipping |
| (5) Section 91 (12) | —Seacoast and Inland Fisheries |
| (6) Section 91 (24) | —Indian Lands |
| (7) Section 91 (27) | —Criminal Law |
| (8) Section 91 (29) and Section 92 (10)— | Extra-provincial Works and Undertakings and Works declared to be for the general advantage of Canada |
| combined | |
| (9) Section 95 | —Agriculture |
| (10) Section 132 | —Empire Treaties |

4. For Prince Edward Island, see order in council under B.N.A. Act, s. 146 of June 26, 1873, reproduced in R.S.C., 1971, Appendices, pp. 291 *et seq*; for Newfoundland, see British North America Act (No. 1), 1949, 12 and 13 Geo. VI, c. 22 (Imp.). See La Forest, *Natural Resources and Public Property under the Canadian Constitution* (Toronto, 1969), pp. 33-4, 45-7.

Peace, Order and Good Government

The opening words of section 91 (the "Peace, Order and Good Government" clause), as fortified by the closing words of the section, on their face give the impression that the federal Parliament has a general power to legislate over any matters not exclusively falling within the provincial legislative field, and that the particular headings are merely instances of the general powers that are to be exercised notwithstanding that they might otherwise fall within provincial power. In a word, section 91 was intended as a residuary source of legislative power. In fact, this residuary role of section 91 has, as the British North America Act has been interpreted, been confined to a relatively narrow role.⁵ For most purposes, the powers given to the provinces over property and civil rights and over local and private matters by section 92 (13) and (16) of the Act have served as residuary clauses.⁶ The "Peace, Order and Good Government" clause has, however, been employed by the courts to bring into the ambit of federal power a number of matters, such as radio,⁷ aeronautics⁸ and the National Capital Commission,⁹ that by their nature affect Canada generally or go beyond the concern of any province. Thus far only the reference *Re: Offshore Mineral Rights of British Columbia*,¹⁰ which, *inter alia*, gives to the Dominion legislative power over the territorial sea off British Columbia, gives to the Dominion any significant power in relation to the development of water resources under the residual power in section 91. If the reasoning of that case is applied to the Atlantic Provinces, it may be of some considerable significance in the development of coastal waters in the region. The "Peace, Order and Good Government" clause may also give the Dominion at least some measure of authority over international and interprovincial rivers.¹¹ Such rivers surely go beyond the concern of any one province. In my view, the clause is the principal constitutional basis of the International River Improvements Act prohibiting the erection of works altering the natural flow of rivers flowing outside Canada.¹²

The "Peace, Order and Good Government" clause has also been used to develop an "emergency" power. Where a matter falling primarily into section 91 (13) or (16) attains such dimensions as to affect the body politic of the Dominion and becomes a matter of national concern, it may be categorized as falling within the clause. Thus if a health crisis develops from water pollution or other cause this would permit the Dominion to act.¹³

One further word should be added about the residual portions of section 91. Even though the words "notwithstanding anything in this Act" refer solely to the

5. For a brief discussion, see Laskin, *Canadian Constitutional Law*, 3rd ed. (Toronto, 1966), pp. 269-71.

6. See *ibid.*, pp. 435 *et seq.*

7. In *Re Regulation and Control of Radio Communication*, [1932] A.C. 54.

8. *Johannesson v. West St. Paul*, [1952] 1 S.C.R. 292.

9. *Munro v. National Capital Commission*, [1966] S.C.R. 663.

10. [1967] S.C.R. 792.

11. See Chapters Sixteen and Seventeen.

12. See p. 343.

13. See *Attorney-General of Ontario v. Canada Temperance Federation*, [1946] A.C. 193; see also Laskin, "Jurisdictional Framework for Water Management" in *Resources for Tomorrow, Conference Background Papers* (Ottawa, 1962), Vol. 1, p. 211, at p. 218.

specific heads of power the courts have established a doctrine of paramountcy of all valid federal legislation. Where there is conflict between federal and provincial legislation, federal law prevails.¹⁴

Public Property

Section 91(1A), which gives the Dominion exclusive legislative power over its public property, is a most important source of federal power in relation to the development of water resources.¹⁵ In the first place, the Dominion may do whatever it wishes with its property, and accordingly where it owns land it may develop any water or water powers connected with it, and make any legislation concerning that property even if such legislation would ordinarily fall within provincial ambit. So long as it retains title, the Dominion may lease the land and control its development, including the development of any water in or on the land. What is more, the weight of authority indicates that provincial legislation does not apply to federal property, so that the development of water on Dominion lands is free of provincial regulatory control. This federal exemption from provincial legislation if widely interpreted could raise most serious problems where provincially authorized works on provincially or privately owned lands affect the flow of water on federal lands. Some reasonable accommodation is likely to be made.

Though the Dominion cannot compulsorily acquire land except for purposes falling within its ordinary legislative powers,¹⁶ there is nothing to prevent it from using its money to buy land and other rights for the management of water; for public money, too, is public property which the Dominion may use as it wishes.

The fact that money is public property considerably strengthens the Dominion's power in the field of water development. Thus it may promote the development of water resources by means of grants to individuals, private organizations, municipalities or the provinces. And it may influence the direction of such development by attaching conditions to the grants. But, while it can influence, it cannot regulate water development by means of this "spending" power. Among other limitations this implies, it means that the provinces, within the areas of their legislative competence, could regulate water resources in such a way as to frustrate federal initiative in water development.

In addition to the spending power, the Dominion may also promote the development of water by lending. It is conceivable that this may give somewhat broader power than the spending of money for a debt owing to the federal government is property and legislative power may be exercised over it.

Defence

The federal Parliament's power over defence under section 91(7) of the British North America Act probably authorizes it to do anything for that purpose, including the development of water and water works ordinarily falling within

14. See, for example, *Johannesson v. West St. Paul*, [1932] A.C. 54.

15. This power is discussed in more detail later at pp. 18-28, where appropriate references are given. More extensive treatment appears in La Forest, *Natural Resources and Public Property under the Canadian Constitution* (Toronto, 1969).

16. See La Forest, *ibid.*, pp. 136-43, 149.

provincial competence.¹⁷ This would include the compulsory taking of land which is in any event provided for by section 117 of the Act. Parliament could not under the guise of legislating respecting defence, however, take jurisdiction over water development generally and would probably not attempt it. It is well to remember, however, that once it has legitimately appropriated land for a purpose, it becomes public property and may be used by the Dominion as it sees fit.

Navigation and Shipping

Section 91(10), the "Navigation and Shipping" power, as the name implies authorizes the Dominion to regulate navigation and shipping in a very broad way.¹⁸ This includes power to regulate navigation, to improve the navigability of water and to prevent the erection of works that might impede navigation either absolutely or on condition of obtaining a licence or permit. Though there may be room for some doubt, it would appear that the Dominion may expropriate for navigation purposes, but assuming this is so the power could not be used as a cloak for permitting expropriation of even closely related works. The use of the navigation and shipping power to effect other purposes, such as hydro-power development or flood control, has not been the subject of intensive judicial scrutiny, but so far as the authorities go they indicate that any attempt to use section 91(10) for this purpose would be kept within a very narrow ambit.¹⁹ It seems clear, for example, that works for power development alone in navigable waters could not be justified under this head.²⁰ In fact, though the federal Parliament has ample discretion to decide what works may be necessary to improve navigation, there really is nothing in the cases to give any foundation to the view that these works might be used for purposes such as power development, however convenient this might be. It may be, of course, that works for the improvement of navigation, for example, by means of storage, might incidentally serve to control flooding as well as to improve navigation, but it is open to doubt if the navigation and shipping power could be much more extensively used as a lever for federal exercise of jurisdiction over flood control. In such areas federal-provincial co-operation seems called for.

The regulation of navigation being in the federal Parliament, the provinces are incompetent to authorize interferences with navigation, even in the absence of federal legislation. The better view, however, would appear to be that the provinces may regulate floating, as opposed to navigation, so long as it does not interfere with navigation. Moreover, the provinces may authorize the construction of works that would interfere with navigation, but in the absence of federal authorization such works would be subject to removal by the federal or provincial Attorney-General or anyone seeking to exercise his rights of navigation. It follows that works falling within provincial competence, for example, hydro-power development, if constructed in navigable waters may require authorization from both provincial and federal authorities.

17. For a discussion, see Laskin, "Jurisdictional Framework for Water Management", in *Resources for Tomorrow, Conference Background Papers* (Ottawa, 1962), vol. 1, p. 211, at p. 220.

18. This power is discussed in detail at pp. 28-38, where appropriate references are given.

19. See Laskin, "Jurisdictional Framework for Water Management" in *Resources for Tomorrow, Conference Background Papers* (Ottawa, 1962), vol. 1, p. 211, at pp. 216-8.

20. See *Booth v. Lowery* (1917), 54 S.C.R. 421, per Fitzpatrick C. J. at p. 424 and Duff J. (dissent) at p. 429; *Reference re Waters and Water Powers*, [1929] S.C.R. 200, at p. 225.

Finally, it might be mentioned that while legislative power over shipping and ferries is vested in the Dominion, the provinces may incorporate and regulate intra-provincial lines of ships and ferries, subject to their complying with the federal navigation laws.

Sea Coast and Inland Fisheries

Section 91(12), "Sea Coast and Inland Fisheries", gives to the Dominion general power to regulate fishing, including the establishment of licensing schemes and closed seasons and making provision for the preservation of fisheries,²¹ which would include the power to prohibit pollution for the purpose. It should be observed that the power is limited to fisheries; it does not include the regulation of fish as an article of trade, and accordingly the regulation of fish canneries could not be justified under this head but would fall within provincial jurisdiction. However, a provision preventing the possession of fish as ancillary to the regulation of the fisheries, for example, in assisting to maintain closed seasons or a prohibition to catch certain fish, would certainly be valid.

Section 91(12) is intended to give legislative power to the Dominion, not property rights. Accordingly while the Dominion may, in regulating fisheries, seriously affect property rights—for example, by prohibiting a landowner from fishing on his land—it cannot legislate respecting his property rights as such—for example, by giving a federal licensee exclusive power to fish on another person's land unless, at least, this can be justified as in some way benefitting the fisheries. This may lead to the belief that expropriation cannot be justified under the fisheries power, but the probability is that federal expropriation for this purpose may be justified if shown to be necessary for the effectual exercise of the power.

On tidal waters there is a public right of fishing that overrides any private right of fishing, so that federal power may be exercised without regard to rights of property in fishing. This is limited to ordinary fishing. Fishing with weirs and other instruments requiring the use of the solum requires the permission of the landowner, whether this be a private individual or a province.

The vesting of power over fisheries in the federal Parliament divests the provinces of authority to legislate on fisheries in a general sense. An unqualified provincial Act dealing with fisheries would be *ultra vires*. But the provinces, nonetheless, have some scope. Provincially owned land, like privately owned land, carries with it the right to fish in any waters thereon.²² Subject to complying with federal laws respecting fishing, therefore, a province may exercise this right and permit individuals either by lease or permit to use the right subject to such terms and conditions as it sees fit to impose. It may also do this by legislation, for section 92(5) authorizes the provinces to legislate respecting the management of their lands. Accordingly, provinces may enact legislation regulating fishing on their lands, including the establishment of licensing schemes, closed seasons, and other fishery regulations. The federal and provincial legislation may exist concurrently, but where there is conflict federal legislation will prevail. As already

21. This power is discussed in more detail at pp. 38-42, where appropriate references are given. See also La Forest, *Natural Resources and Public Property Under the Canadian Constitution* (Toronto, 1969).

22. Provincial legislative power over its property is discussed in more detail at pp. 13-4, where appropriate references are given. See also La Forest, *ibid.*

mentioned, provincial property right may extend into tidal waters, and where use of the subsoil is required for certain types of fishing, for example, oyster fishing, the provinces may make provision by legislation to lease areas for conducting such fisheries. In some cases, however, the provinces have transferred to the federal government the administration of provincially owned oyster beds.

Indian Lands

Section 91(24) of the British North America Act gives the Dominion power to administer Indian lands.²³ Under section 109 the Indians continued to enjoy a usufructuary title to lands reserved for them before Confederation, but the underlying title continued to belong to the provinces. The nature of the Indian title, though never precisely defined, seems to be related to the Indian mode of life, and if so the Dominion would not appear to have any power to initiate large scale water development on these lands without provincial co-operation. Nor would the provinces alone be able to do so because this would interfere with the usufructuary title of the Indians which falls within federal legislative competence. Of course, the Dominion may accept a surrender of, or otherwise abolish the Indian title, but when they do so title vests completely in the province which then may legislate respecting the lands as it can with any other property.

On the other hand, there are reserves that the Dominion may have acquired under other means than under the British North America Act. In Prince Edward Island, while some reserves continue to be governed by the arrangements under the British North America Act, others were otherwise acquired by the Dominion. In New Brunswick and Nova Scotia the underlying title to Indian reserves has by agreement been vested, subject to certain conditions, in the Dominion. Accordingly the Dominion has complete control over these lands and could use them for power development in the same way as other property. In Newfoundland this problem does not arise since there are no Indian reserves.

Criminal Law

Section 91(25), giving the Dominion power to make criminal law, *inter alia*, gives the Dominion power to make prohibitions for the protection of the public health, safety and morals.²⁴ Accordingly it could prohibit the pollution of water. But criminal law being essentially prohibitory, administrative controls or other regulatory powers relating to pollution would be seriously limited.²⁵ The Dominion may also make other random prohibitions relating to water resources, such as, for example, prohibiting the taking of lumber being driven down streams, or prohibiting unfenced holes in ice except under certain conditions.

Extraprovincial Works and Undertakings

By the combined operation of sections 91(29) and 92(10) works and undertakings connecting the province with other provinces or extending beyond the

23. This power is discussed in more detail at pp. 42-5, where appropriate references are given. See also La Forest, *ibid.*

24. See *Reference re Validity of Section 5(a) of the Dairy Industry Act (the Margarine Reference)*, [1949] S.C.R. 1.

25. See *Proprietary Articles Trade Association v. Attorney-General of Canada*, [1931] A.C. 310.

limits of a province come within federal legislative power.²⁶ Among matters relating to water, canals and lines of ships are expressly named. It would also appear to include water distribution systems situate partly in one province and partly in another province or a foreign country. It would also, under circumstances to be described with more particularity later, include undertakings for hydro-power development and distribution connecting two or more provinces or extending beyond the limits of a province.

The Declaratory Power

In addition to jurisdiction over extraprovincial works and undertakings, sections 91(29) and 92(10), read in conjunction, give the Dominion power to extend its legislative power over any work, though wholly situate within a province, by declaring it to be for the general advantage of Canada or of two or more provinces.²⁷ This may be exercised in respect of works related to the development of water resources, but in recent years political considerations have militated against the exercise of the power.

Agriculture

Section 95 gives the Dominion and the provinces concurrent power over agriculture, and expressly provides that in case of conflict federal law prevails. Though agriculture has been strictly limited to matters of direct relation or concern with agricultural operations,²⁸ and so does not include agricultural products as articles of trade²⁹ or the financing operations of purchasing agricultural lands,³⁰ it would certainly appear to comprise irrigation and land reclamation for agricultural purposes.³¹

Empire Treaties

Section 132 gives the federal Parliament and government all power relating to the obligations of Canada under a treaty of the British Empire.³² The power is most important because it underlies federal power over a number of important water treaties, notably the Boundary Waters Treaty, which provides a framework of laws governing the international and boundary waters of Canada and the United States. Apart from its power under such treaties federal jurisdiction over international and boundary waters remains unexplored. Section 132, however, applies

26. This power is discussed in detail at pp. 46-56, 59-63, where appropriate references are given.

27. This power is discussed in detail at pp. 46, 56-63, where appropriate references are given.

28. See *R. v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434, at p. 457; *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd.*, [1933], A.C. 168, at p. 174.

29. *R. v. Manitoba Grain Co.* (1922), 66 D.L.R. 406; *R. v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434; *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd.*, [1933] A.C. 168; *Canadian Federation of Agriculture v. Attorney-General of Quebec*, [1951] A.C. 179.

30. *Attorney-General of Saskatchewan v. Attorney-General of Canada*, [1949] A.C. 110.

31. See the broad definition of "agriculture" in *R. v. Manitoba Grain Co.* (1922), 66 D.L.R. 406; see also *R. v. Davenport*, [1928] 2 D.L.R. 852; see also Laskin, "Jurisdictional Framework for Water Management" in *Resources for Tomorrow, Conference Background Papers* (Ottawa, 1962), vol. 1, p. 211, at p. 219; Leo McGrady "Jurisdiction for Water Resource Development" (1967), 2 Man. Law Jo. 219, at pp. 236-7; Dale Gibson, "The Constitutional Context of Canadian Water Planning" (1969), 7 Alta. Law Rev. 71, at p. 84.

32. This power is discussed in detail at pp. 63-8, where appropriate references are given.

only to Empire treaties, not to treaties negotiated by Canada. The federal government has power to negotiate treaties for Canada, and on ratification such treaties apply to Canada under international law, but incorporation of their provisions as part of the law of the land must be done in accordance with the ordinary division of power between the federal and provincial legislatures. There is no legislative power respecting treaties, as such, apart from Empire treaties.

Bases of Provincial Power

The principal bases of provincial power over water development are the powers under section 92(13) and (16) to legislate respecting property and civil rights in the province and matters of a local or private nature.³³ As already mentioned these two heads of power in effect constitute a residuary legislative power and under these a province may, in relation to water development, exercise, *inter alia*, jurisdiction over water supply, power development, water conservation, flood control, pollution and recreation. Subsidiary sources of provincial power include their control over municipalities (to which they may delegate any provincial powers such as the provision of water supply),³⁴ over local works and undertakings, for example, dams, bridges, intraprovincial lines of ships, over companies with provincial objects, such as slide and boom companies, and over agriculture which, subject to federal legislation, gives them control over irrigation and land reclamation for agricultural purposes. The provinces' authority apparently enables them to expropriate land within their territories for any purpose, even without compensation,³⁵ though the courts would lean against interpreting legislation as permitting compulsory taking without compensation.

Another important provincial power is section 92(5) giving the provinces power over the management and sale of public lands.³⁶ As in the case of federal jurisdiction over its property, this enables a province to do anything in respect of its lands that a private person may do, and to enact legislation in regard thereto. This permits it entry into what otherwise might fall exclusively within the federal domain. In relation to water, for example, it may deal with fisheries or improve navigation on its lands. This is, of course, of the highest importance because the public domain is vested in the provinces, and most provinces still have vast areas of ungranted lands. It is, however, subject to overriding federal legislation.

In common with the Dominion, the provinces also exercise "spending" and "lending" powers. These may flow either out of the prerogative³⁷—the residue of

33. For the general nature of these powers, see Laskin, *Canadian Constitutional Law*, 3rd ed. (Toronto, 1966), pp. 269-71; for its application to water management, see Laskin, "Jurisdictional Framework for Water Management" in *Resources for Tomorrow, Conference Background Papers*, vol. 1 (Ottawa, 1962), p. 211; Leo McGrady, "Jurisdiction for Water Resource Development" (1967), 2 Man. Law Jo. 219; Dale Gibson, "The Constitutional Context of Canadian Water Planning" (1969), 7 Alta. L.R. 71; Henry Landis, "Legal Controls of Pollution in the Great Lakes Basin" (1970), 48 Can. Bar Rev. 66.

34. See *Hodge v. The Queen* (1883), 9 A.C. 117.

35. See *Municipality of Cleveland v. Municipality of Melbourne and Brompton Gore* (1881), 4 L.N. 277; *Florence Mining Co. Ltd. v. Cobalt Lake Mining Co.* (1908), 18 O.L.R. 274, at p. 279; affirmed: (1918), 43 O.L.R. 474.

36. This power is discussed in detail at pp. 68-9, where appropriate references are given.

37. F. R. Scott, "Our Changing Constitution" (1961), 55 Proc. Royal Soc. of Canada, 3rd ser., vol. LV, p. 83, at p. 91; reproduced in Lederman, *The Courts and the Canadian Constitution* (Toronto, 1964), p. 19, at pp. 28-9.

power left to the Crown—or from legislative power over the Crown's property and civil rights in the province. In any event, this permits the provinces to exercise influence, for example, by conditional grants, over areas of federal concern, such as the development of fisheries and the improvement of navigation.

FUNCTIONAL DESCRIPTION OF CONSTITUTIONAL PROBLEMS

Introduction

The foregoing constitutes a brief introduction to the major sources of federal and provincial power. The technicalities of the most important of these will be examined later. Before doing so, however, it would seem useful to deal with the implications of the division of legislative power in functional terms.³⁸

Water Supply

Power to make laws respecting the supply and distribution of water, whether for domestic or industrial purposes, generally lies with the provinces. This would include the control of pollution, chemical treatment, fluoridation and the like. In doing so a province must not interfere with the public right of navigation, federal public property and Indian lands, and valid federal legislation within its own fields, for example, prohibitions against pollution, but the area of provincial control is obviously wide. Federal legislative power would appear, however, to extend to water supply systems crossing interprovincial and international boundaries, as works connecting one or more provinces or extending beyond the limits of the province. There are several such water systems on the Maine-New Brunswick border. Works on international rivers might also be subject to the provisions of the Boundary Waters Treaty implemented under section 132 of the British North America Act. Indeed, in interprovincial and international rivers, the federal Parliament may have extensive jurisdiction under the "Peace, Order and Good Government" clause. Finally, of course, federal grants in aid may be used as incentives for the construction of water supply systems.

Sewage Disposal

This, too, generally falls within provincial competence, subject to federal laws within its fields. Among the areas of federal competence that may be relevant here are federal laws against pollution justified either as criminal law or as laws relating to fisheries where sewage is dumped in streams. Here again, federal involvement in interprovincial and international rivers may be justifiable under the "Peace, Order and Good Government" clause.

38. Appropriate references have already been given in the previous discussion or will be given in the discussions of particular powers in the latter portion of this chapter. For other functional descriptions of the constitutional problems relating to the development of water resources see Laskin, "Jurisdictional Framework for Water Management" in *Resources for Tomorrow, Conference Background Papers* (Ottawa, 1962), vol. 1, p. 211; Leo McGrady, "Jurisdiction for Water Resource Development" (1967), 2 Man. Law Jo. 219; Dale Gibson, "The Constitutional Context of Canadian Water Planning" (1970), 7 Alta. Law Rev. 71.

Navigation and Floating

The control of navigation, as already mentioned, falls within section 91(10) of the British North America Act, though the floating of logs and other goods probably falls within provincial jurisdiction. The subject has already been sufficiently discussed in functional terms.

Fishing

The regulation of fisheries, too, is a federal responsibility, though the provinces may, subject to federal legislation, regulate provincially owned fisheries. This has also been sufficiently discussed already.

Pollution

A province may control the pollution of water, whether this be in connection with municipal water supply, running streams or surface and ground waters as well as tidal waters within the limits of the province.

The federal Parliament may prohibit pollution under its criminal law power, for example where it would constitute a danger to public health. Criminal law, however, gives at best very limited regulatory powers. The federal Parliament also has jurisdiction to prevent pollution for the preservation of fisheries and in the interests of navigation and shipping. The latter power would at least encompass the regulation of ships disposing of deleterious matter in waters. In any event, the federal Parliament would have power to regulate pollution, within the limits permitted by international law, in areas of the sea falling outside the limits of the provinces. It probably has some jurisdiction over pollution in international streams to meet its obligations to other countries, and it probably also has power over pollution of interprovincial and international rivers where pollution in one province deleteriously affects persons in other provinces or countries. Again, there seems no doubt of the federal Parliament's power to regulate pollution in national crises. Finally some Empire treaties may impose responsibilities on the Dominion to prevent pollution, as is the case under the Migratory Birds Convention.

As in other cases, where federal and provincial legislation conflict, the federal legislation will prevail, but it seems doubtful that courts will be over-assiduous in finding conflict.³⁹

Irrigation

Irrigation would appear to fall within section 95 of the British North America Act (the agriculture power) giving the Dominion and provinces concurrent power, with federal power prevailing in case of conflict. In fact, here as in other cases federal initiative would prevail over other provincially authorized activity. For example, the Dominion could authorize irrigation works depleting the flow of a river in such a way as to interfere with power development or municipal water supplies.

Power Development

Power developments, whether minor dams for supplying water power for a small mill, or giant hydro-electric power developments, generally fall within provincial responsibility. Here it must be remembered that the provinces cannot

39. For an excellent discussion of this question, see Henry Landis, "Legal Controls of Pollution in the Great Lakes Basin" (1970), 48 Can. Bar Rev. 66.

interfere with the public right of navigation or federal laws respecting navigation, so federal permission will be required on navigable rivers. The federal Parliament is also permitted to protect the fisheries, and thereby interfere with provincial power development.

The Dominion has full discretion to use its lands as it wishes so it could develop power on its own lands. It may also have jurisdiction over international and interprovincial rivers under the "Peace, Order and Good Government" clause. It certainly has jurisdiction, through the International Joint Commission, over certain obstructions on international rivers by virtue of the Empire treaty clause.

One head of jurisdiction that may give the federal Parliament considerable scope over power development is that over works and undertakings connecting a province with another province or extending beyond the limits of the province. Even though the works used for power development may be wholly situate within a province, they may become connecting works by virtue of their relation to a power distribution system that is interprovincial or international in scope. This raises complex legal questions to be discussed more fully in the detailed discussion of interprovincial works and undertakings.

Finally, power works, like any works situate wholly within a province, may be brought within federal jurisdiction by a Parliamentary declaration that the work is for the general advantage of Canada or for the advantage of more than one province. The declaratory power, though legally unlimited, raises serious problems on the political level and is not likely to be exercised often unless, at least, there already is considerable federal involvement in a development, for example, a power development closely associated with a work for the improvement of navigation.

Flood Control

Flood control projects fall generally within the provincial sphere. Federal works for the improvement of navigation may, of course, incidentally result in the control of flooding, but it is extremely doubtful if the navigation power may be exercised to foster flood control measures except as a necessary adjunct to improved navigation. On its own lands, however, it would appear that the Dominion could erect flood control projects, though it could be argued that this was not really legislation respecting public property unless the lands themselves benefitted. The declaratory power could, of course, be exercised to bring in flood control projects within the federal sphere.

Recreation

Recreational uses of water also fall generally within provincial control, though this power must be exercised subject to federal regulation within its own sphere, particularly in relation to navigation and fishing. Federal involvement is extensive, however, largely through its ownership of the national parks. Its spending power may also be exercised for this purpose. Again, it may also have some jurisdiction in this area in international and interprovincial rivers. Moreover in areas of the sea outside the limits of the provinces, federal legislation alone would apply.

Multi-purpose Development

Multi-purpose development falls largely within provincial competence, though if navigation or fishing is involved federal participation will also be required. Even where multi-purpose development or reclamation extends to areas in two provinces, it still falls largely within provincial competence except where interconnecting works and undertakings are involved or the spending and declaratory powers are used.

FEDERAL-PROVINCIAL CO-OPERATION

As has been noted from time to time in the foregoing discussion, federal-provincial co-operation will on many occasions be required for a full and rational development of water resources. This can, of course, be done by concurrent action of federal and provincial authorities, each in its own sphere, even without any formal understanding. For example, a province may empower a company to build a hydro-electric power or other project in navigable waters, but permission to obstruct such waters must be obtained from the federal authorities.

Again, administrative convenience may dictate the use of a single official to enforce or administer both federal and provincial laws relating to the same subject matter. For example, a province may assign to federal fishery officers the task of enforcing the laws relating to provincially-owned fisheries, and a similar delegation of administrative duties may be made the other way. Such co-operation may also take place at a more highly developed level. Though delegation of legislative power between the federal Parliament and the provincial legislatures is impossible,⁴⁰ it is possible for one level of government to delegate executive and administrative authority (including the making of regulations) to administrative agencies created by the other level of government.⁴¹ For example, the Dominion delegates to provincial motor carrier boards the power to license and supervise the operation of interprovincial carriers that fall within federal competence under the combined effect of sections 91(29) and 92(10).

Co-operation between the federal and provincial governments may take place by the transfer of all or part of the control over public property. For each level of government has legislative and administrative power over the public property subject to its control. One example of a partial transfer of such administrative authority is the delegation by some provinces to the federal authorities of the power to issue leases of oyster beds belonging to the provinces. An example of a complete transfer of such authority is the grant of provincial wharves and piers to the federal government. A more far-reaching example is federal-provincial co-operation in the acquisition of lands for the development of national parks. The power of the Dominion to expropriate for this purpose is at least doubtful since its power of expropriation is limited to matters falling within its legislative powers, but the provinces would appear to have expropriation powers for any purpose.

40. *Attorney-General of Nova Scotia v. Attorney-General of Canada*, [1951] S.C.R. 31.

41. *Prince Edward Island Potato Marketing Board v. H. B. Willis Inc. and Attorney-General of Canada*, [1952] 2 S.C.R. 392.

Accordingly some provincial statutes make provision for expropriating lands to be transferred to the Dominion for the purpose of converting them into national parks.⁴²

PARTICULAR LEGISLATIVE POWERS

Introduction

The foregoing discussion of the situations where constitutional problems are likely to arise in relation to water resources development must now be complemented by a technical legal examination of some of the more important federal and provincial legislative powers relevant to the development of water resources. The particular powers to be examined are the following:

- (1) Federal Public Property
- (2) Navigation and Shipping
- (3) Sea Coast and Inland Fisheries
- (4) Indian Lands
- (5) Works and Undertakings
- (6) Empire Treaties
- (7) Provincial Lands

Federal Public Property

Legislative Power—General

Section 91(1A) of the British North America Act⁴³ gives the Dominion exclusive legislative power notwithstanding anything in the Act to legislate respecting public property, that is, property owned by the Dominion,⁴⁴ either directly or through some instrumentality such as a Crown corporation.⁴⁵ The term "Public property" has been broadly construed so as to include every kind of asset,⁴⁶ however acquired, whether by constitutional provision, confiscation, purchase or expropriation.⁴⁷ When, however, the Dominion completely divests itself of property, it ceases to be subject to Dominion jurisdiction under section 91(1A).⁴⁸

Since the Dominion owns a vast amount of property, it is obvious that section 91(1A) is an important source of legislative power. The power is extensive in another respect. It applies to displace laws that would normally fall within provincial competence. In *R. v. Red Line Ltd.*,⁴⁹ for example, it was held that the Federal

42. See, for example, The National Parks Land Act, R.S.N., 1952, C. 50.

43. Formerly, section 91(1); changed by the British North America Act (No. 2) 1949, 13 Geo. VI, c. 81; see also Term 36, Newfoundland Terms of Union, confirmed by the British North America Act, 1949, 12 & 13 Geo. VI, c. 22. For a full discussion of this power, see La Forest, *Natural Resources and Public Property under the Canadian Constitution* (Toronto, 1969).

44. See *Deeks McBride Ltd. v. Vancouver Associated Contractors Ltd.*, [1954] 4 D.L.R. 844.

45. See, *inter alia*, *R. v. Red Line Ltd.* (1930), 54 C.C.C. 271; *Validity and Applicability of the Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529, at p. 554.

46. *Reference re Employment and Social Insurance Act*, [1936] S.C.R. 427, per Duff C. J. and Davis J. (diss.); *R. v. Bell Telephone Co.* (1935), 59 Que. K.B. 205, at p. 212.

47. *Deeks McBride Ltd. v. Vancouver Associated Contractors Ltd.*, [1954] 4 D.L.R. 844.

48. See, *inter alia*, *Attorney-General of British Columbia v. Attorney-General of Canada* (1899), 14 A.C. 295; *Mercury Oils Ltd. v. Vulcan Brown Petroleum Ltd.*, [1943] S.C.R. 37.

49. (1930), 54 C.C.C. 271; see also *Validity and Applicability of the Industrial Disputes Investigation Act*, [1955] S.C.R. 529, at p. 544; *R. v. Hughes* (1958), 122 C.C.C. 198; *Reg. v. Glibbery* (1963), 46 D.L.R. (2d) 548.

District Commission might validly regulate the use of the roads on its lands, and so give an exclusive franchise to persons running buses there. The importance of this doctrine can hardly be overrated. It can support all sorts of federally owned businesses that might otherwise fall within provincial competence, such as the Polymer Corporation. This power could be used to considerable advantage in developing water resources, for lands owned by the federal government include the right to use the waters and water-powers thereon.⁵⁰ However, while it could thus use lands it owns, and buy others for the purpose—for money, too, is property and the federal authorities have complete discretion to use it in any manner they wish⁵¹—it could not expropriate for purposes otherwise falling within section 92 because this would amount to legislation respecting a provincial matter. A noted authority has, in fact, doubted that section 91(1A) could support an expropriation,⁵² and if it could at all, it is suggested it would be limited to expropriation for the effectual use of other public property.

A most important aspect of the exclusive federal legislative power over its property is that provincial legislation may thereby be excluded from operating in relation to public property or abridging any proprietary privilege of the Crown. This, at least, is the predominant view.⁵³ So that when the Dominion operates a business or undertaking either directly or through a Crown corporation it is free of provincial regulatory and taxing powers.⁵⁴ Moreover, if the business is within a federal sphere it can exclude competitors. There are even occasions where mere executive power over public property will override federal legislation. Thus in *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*,⁵⁵ the Supreme Court of Canada expressed the view that the rights of an individual under a lease of Dominion lands could not be interfered with by the provinces.

It seems doubtful, however, that the courts have completed their work of adjusting federal and provincial power in this area, and there are decisions that would indicate a different conclusion.⁵⁶ Certainly the exemption of federal public property from the operation of provincial legislation, if carried to its logical extreme in relation to water resources, might completely frustrate normal provincial legislative initiative, and the courts might try to find a way to avoid doing so. For example, if the Crown in right of the federal government is the owner of a small piece of riparian land, it is entitled as an incident to its proprietary right to have the water flow to the land undiminished in quantity and quality. A provincially authorized mill or power development upstream would almost necessarily interfere with that right. Accordingly, if the federal exemption is rigorously applied, provincial legislative power in this domain could easily be frustrated.

50. *Burrard Power Co. Ltd. v. R.*, [1911] A.C. 87.

51. See *Reference re Employment and Social Insurance Act*, [1936] S.C.R. 427, per Duff C. J., at p. 431. Though this was a dissenting judgment, the reasons of the majority are not against this view; the majority simply believed the scheme there was not one merely distributing money but a substantive regulatory scheme falling within provincial power.

52. See Laskin, *Canadian Constitutional Law*, 3rd ed. (Toronto, 1966), p. 566.

53. See *R. v. Powers*, [1923] Ex. C. R. 131; *Attorney-General of Alberta v. Attorney-General of Canada*, [1928] A.C. 475; see also *Gauthier v. R.* (1918), 56 S.C.R. 176.

54. Provincial taxation of federal property is expressly prohibited by the *British North America Act*, s. 125.

55. [1933] S.C.R. 629.

56. See *Dominion Building Corporation v. R.* [1933] A.C. 533; *R. v. Murphy*, [1948] S.C.R. 357; *Bank of Nova Scotia v. Reg.* (1961), 27 D.L.R. (2d) 120. For a detailed study, see Dale Gibson, "Interjurisdictional Immunity in Canadian Federalism" (1969), 47 Can. Bar Rev. 40.

The Lending and Spending Power

Though they may be looked upon as aspects of legislation respecting public property,⁵⁷ the federal spending and lending powers are sometimes justified by prerogative power,⁵⁸ or under the "Peace Order and Good Government" clause,⁵⁹ so they may be dealt with separately. These powers raise one of the most important issues in the Canadian constitution. In a technical sense the issue may be put in this way. Since the Dominion may raise money by all or any means of taxation under section 91(3), may it not when it has raised the money use it in any way it wishes (since it is then public property) and thereby enter into what ordinarily would be solely within provincial power? In a practical sense if the courts unqualifiedly answered this question in the affirmative, it would mean that the Dominion could legally do anything it wished so long as it framed its legislation carefully. Legally, federalism would exist only in a formal sense, and it would have to be supported wholly by political forces. But the courts have not answered the question in an unqualifiedly affirmative manner. In a broad way the courts will permit the combined use of the taxing and property powers to influence, but not to regulate. Technically this may best be elucidated by reference to the cases.

In the *Unemployment Insurance* case,⁶⁰ a Dominion Act established a fund made up of moneys provided partially by compulsory employer and employee contributions and partially by payments from the Dominion. The fund was administered by a board which paid benefits to unemployed contributors under prescribed conditions. Insurance is normally a provincial matter, but the Dominion sought to uphold the Act by saying that the contributions amounted to a tax, which, when raised, became public property which the Dominion could use in any way it saw fit. However, the Privy Council held that the legislation in substance constituted an insurance scheme falling under the provincial jurisdiction to legislate respecting property and civil rights. The Board thought, without deciding the point finally, that the contributions were more in the nature of insurance premiums than a tax. But in any event, it added, the Dominion cannot dispose of money under a statute that is in pith and substance not legislation respecting property but is so framed as to encroach on the provincial domain.

Nonetheless the Board did say that the Dominion may impose taxation and then make contributions in the public interest to individuals, corporations or public authorities, and in the majority judgments in the Supreme Court of Canada⁶¹ affirmed by the Board it is made clear that such gifts or contributions may be made subject to such restrictions and conditions as Parliament sees fit to impose. There is no compulsion; the donees are free to accept or reject such gifts.

In the other case on the spending power, *Angers v. Minister of National Revenue*,⁶² the appellant had omitted to register his children for allowances under

57. *Reference re Employment and Social Insurance Act*, [1936] S.C.R. 427, per Duff C. J. and Davis J. (diss.); Laskin, *Canadian Constitutional Law*, 3rd ed. (Toronto, 1966), p. 666; La Forest, *The Allocation of Taking Power Under the Canadian Constitution* (Toronto, 1967), c. 7; La Forest, *Natural Resources and Public Property Under the Canadian Constitution* (Toronto, 1969), pp. 136-43.

58. Scott, "The Constitutional Background of the Taxation Agreements" (1955), 2 McGill L. J. 6.

59. *Angers v. Minister of National Revenue*, [1957] Ex. C.R. 83; see also *Porter v. Reg.*, [1965] 1 Ex. C.R. 200.

60. *Attorney-General of Canada v. Attorney-General of Ontario*, [1937] S.C.R. 355.

61. *Reference re Employment and Social Insurance*, [1936] S.C.R. 427.

62. [1957] Ex. C.R. 83.

the Family Allowances Act, but in his income tax return he claimed an exemption of \$300 per child even though the Income Tax Act only allowed an exemption of \$100 for children entitled to family allowances as compared with \$300 for those not entitled. The Minister reduced the exemption to \$100 and the appellant brought action in the Exchequer Court of Canada. The appellant argued that the Family Allowances Act was *ultra vires* in that it required children of school age to attend school as a condition of receiving the allowances. But Dumoulin J. rejected the argument. The Act, he said, was not mandatory but merely offered aid on complying with certain conditions and fell within the "Peace, Order and Good Government" clause. He, however, did intimate that even in the absence of compulsion a different question would arise if by means of grants the federal government attempted to establish a system of education in opposition to the provincial one. Here the schools that children were required to attend were the provincial schools or those approved by the provincial authorities.

The legal basis for federal grants—even conditional grants—seems thus established. While the Dominion cannot thereby legislate on matters within provincial competence, it can nonetheless powerfully influence action in areas that fall within provincial regulatory authority. And it has done so in many instances. Legally, therefore, there is nothing to prevent it from making grants to municipalities or private bodies to assist in establishing municipal water systems or promote anti-pollution schemes or any other scheme for the development of water resources.

Another technique often employed by the Dominion authorities is to agree to grant monies to the provinces on condition that the provinces enact legislation of a particular kind. There seems no constitutional objection to this. The Dominion is merely exercising its discretion regarding the manner in which it shall use its property, its money, while the province is simply enacting legislation within its power. Again this device could be employed in relation to anti-pollution or hydro-electric schemes or any other scheme for the development of water resources.

Finally, the Dominion, instead of spending its money, may lend it, subject to compliance with certain conditions, as it does, for example, under the National Housing Act. This device may provide even greater scope for the advancement of federal policies than the spending power. Since debts owing to the Dominion constitute public property the Dominion may exercise legislative power over them under section 91(1A) of the British North America Act.⁶³

Federal Property Rights Relating to Water Resources

The Dominion's power to spend its money as it pleases enables it to buy property without compulsion from individuals or the provinces even when it is intended to be used for purposes falling within the provincial regulatory domain. Moreover, in the exercise of its various heads of power, the Dominion may acquire property either by purchase or expropriation.⁶⁴ As already noted, when the Dominion owns property it has exclusive legislative jurisdiction over it as public property

63. See Gouin and Plaxton, *Legislative Expedients and Devices Adopted by the Dominion and the Provinces*, a study prepared for the Royal Commission on Dominion-Provincial Relations (Ottawa, 1939).

64. For details on the federal power of expropriation, see La Forest, *Natural Resources and Public Property Under the Canadian Constitution* (Toronto, 1969), pp. 149-55; see also this chapter at pp. 37-8, 39-41.

under section 91(1A) of the British North America Act. It is evident, therefore, that the ownership of property is of the greatest importance to the Dominion in the development of any resources, including water resources.

In addition to the property the Dominion may have acquired by purchase, expropriation or otherwise, the provinces at Confederation (including New Brunswick and Nova Scotia) transferred to the Dominion a number of assets relating to its legislative powers under the combined effect of section 108 and the Third Schedule to the British North America Act.⁶⁵ These provisions were made applicable with modifications to Prince Edward Island under its Terms of Union,⁶⁶ but in Newfoundland express provision was made by Term 33 of its Terms of Union for the transfer of certain assets of the Dominion.⁶⁷

Some of the assets thus transferred have direct reference to water resources. Among the items enumerated as belonging to the Dominion in the Third Schedule to the British North America Act are the following:

1. Canals, with Lands and Water Power connected therewith.
2. Public Harbours.
3. Lighthouses and Piers, and Sable Island.
4. Steamboats, Dredges and Public Vessels.
5. Rivers and Lake Improvements.
10. Armouries, Drill Sheds, Military Clothing, and Munitions of War, and Lands set apart for general Public purposes.

The only modifications to this list in Prince Edward Island are spent provisions transferring a dredge boat to the Dominion, and retaining for the province a steam ferryboat.

The relevant items transferred to the Dominion under Term 33 of the Newfoundland Terms of Union are the following:

- (a) the Newfoundland Railway, including . . . wharves, drydocks, and other real property;
- (d) public harbours, wharves, breakwaters, and aids to navigation;
- (e) bait depots and the motor vessel *Malakoff*;
- (f) . . . naval property, stores, and equipment;
- (g) public dredges and vessels except those used for services that remain the responsibility of Newfoundland and except the nine motor vessels known as the Clarendville Boats;
- (j) . . . generally all public works and property, real and personal, used primarily for services taken over by Canada.

Many of these items are self-explanatory, but a number of items in the Third Schedule have required judicial elucidation. Before going into the question, however, some general remarks about these transfers should be made. First, the effective day for determining whether an item falls within the Third Schedule (or presumably Term 33) is the day the particular province entered into the Union,⁶⁸

65. (1867), 30 & 31 Vict., c. 3 (Imp.); for a full discussion, see La Forest, *ibid.*, c. 4.

66. Order-in-council under British North America Act, *ibid.*, s. 146; see R.S.C., 1970, Appendices, p. 291.

67. See Schedule to the British North America Act (No. 1), 1949, 12 & 13 Geo. VI, c. 22 (Imp.).

68. *Holman v. Green* (1881), 6 S.C.R. 707, *per* Gwynne J.; *Western Counties Ry. v. Windsor and Annapolis Ry.* (1882), 7 A.C. 178; *Attorney-General of Canada v. Ritchie Contracting and Supply Co.*, [1919] A.C. 999.

July 1, 1867 for New Brunswick and Nova Scotia, June 26, 1873 for Prince Edward Island, and March 31, 1949 for Newfoundland. For example, the question whether a public harbour was transferred to the Dominion depends on whether it was a public harbour on the day of Union. Secondly, the Dominion only acquired whatever interest the province then possessed in the item.⁶⁹ Thirdly, the onus of proof that a particular item falls within the Third Schedule or Term 33 is on the person who alleges it.⁷⁰ Finally, as will be seen, the items in the Third Schedule have been narrowly construed; the same will no doubt be true of those in Term 33 but none of the relevant items in that term have as yet been judicially construed.

Turning to the particular items in the Third Schedule, item 1 has received sparse attention. In *MacDonald v. R.*,⁷¹ however, the Exchequer Court rejected the argument that "Canals" included the "navigations" of a river (whatever that may mean); the argument unsuccessfully sought to make the Dominion liable for an accident on the river. Of "Water Power" Duff C. J., giving the judgment of the Supreme Court of Canada in the *Water Powers* reference,⁷² stated that whatever was comprised in the term was entirely transferred to the Dominion, nothing remaining to the provinces, and that it did not, of course, refer to water powers or improvements to navigation constructed or added to since Confederation. It is well to note, however, that only water powers and lands that were connected with canals were transferred.

The second item in the Third Schedule, "Public Harbours", has been the subject of extensive judicial dissection.⁷³ And since the same phrase is used in paragraph (d) of Term 33 of the Newfoundland Terms of Union, one must suppose that the same meaning was intended to apply in Newfoundland.

A harbour may be described as a place affording protection for ships from violence of the sea.⁷⁴ Most authorities also suggest that it must also be in use for commercial purposes,⁷⁵ and whether or not this is true of harbours generally, it appears to be a requisite of a public harbour within the meaning of the British North America Act.⁷⁶ The decision whether a particular place is a harbour or not is, of course, a question of fact. But a good harbour must be an enclosure affording protection from wind and wave from many directions, having good holding ground with plenty of depth and freedom from rocks and shoals. It goes without saying

69. *Western Counties Ry. v. Windsor and Annapolis Ry.*, (1882), 7 A.C. 178.

70. *R. v. Jalbert*, [1938] 1 D.L.R. 721; *Attorney-General of Canada v. Higbie*, [1945] S.C.R. 385. 71. (1906), 10 Ex. C.R. 394.

72. [1929] S.C.R. 200, at p. 202.

73. For a more elaborate discussion, see G. V. La Forest, "The Meaning of 'Public Harbours' in the Third Schedule to the British North America Act, 1867" (1963), 41 Can. Bar Rev. 519; La Forest, *Natural Resources and Public Property Under the Canadian Constitution* (Toronto, 1969), pp. 49-65.

74. Hale's *De Portibus Maris*, c. 2; *Nash v. Newton* (1891), 30 N.B.R. 610.

75. Stroud, *Judicial Dictionary* (3rd ed., 1952) vol. 2, p. 849; see *Nash v. Newton* (1891), 30 N.B.R. 610; *Attorney-General of Canada v. Ritchie Contracting and Supply Co.* (1914), 20 B.C.R. 333, per Macdonald J.; see also *R. v. Jalbert*, [1938] 1 D.L.R. 721.

76. See *Attorney-General of Canada v. Ritchie Contracting and Supply Co.* (1915), 52 S.C.R. 78, per Duff J.; *R. v. Attorney-General of Ontario and Forrest*, [1934] S.C.R. 133, per Duff C. J.; *Attorney-General of Canada v. Higbie*, [1945] S.C.R. 385, per Rand J.

that these criteria will be met in varying degrees by different harbours, but they are useful to bear in mind.⁷⁷

In order to be a public harbour within the Third Schedule (and presumably Term 33), it must, first of all, have belonged to the province at Union. Thus Saint John Harbour, being vested in the City of Saint John at Confederation, was not a public harbour and had to be expressly conveyed to the Dominion.⁷⁸ Moreover, before Confederation, a harbour must either have (1) been used by the public as a public harbour⁷⁹ (as is the case of Halifax,⁸⁰ Sydney,⁸¹ and Summerside),⁸² or (2) public money must have been expended on it (as in the case of Dark Harbour, Grand Manan),⁸³ or (3) it must have been declared a public harbour by statute or in some official manner.⁸⁴

The most frequently applied test is the first. Accordingly, in the usual case where the question comes up, it is necessary to prove that the public had a right to use and did use the harbour at Union.⁸⁵ As time passes, of course, it becomes increasingly difficult to find adequate evidence of this fact, even though the courts have shown a disposition to accept rather scanty evidence.⁸⁶ The problem is made all the more acute because a finding that a harbour is a public harbour at some point is not enough to make all parts within its ambit a public harbour within the meaning of the British North America Act and so owned by the federal government. It has to be shown of any part in question that it was used as a harbour at Confederation.⁸⁷ At least this is so of the foreshore of a public harbour. There is as yet no definitive answer relating to the bed, but though there are *dicta* both ways, the predominant view is that the transfer of a public harbour to the Dominion carried the whole bed of the harbour, not just the parts actually used as such.⁸⁸ Two cases, one in the Supreme Court of Canada, relating to water lots are explicable only on the latter view. In those cases, *Samson v. R.*⁸⁹ and *Power v. R.*,⁹⁰ the

77. See *Attorney-General of Canada v. Ritchie Contracting and Supply Co.* (1914), 20 B.C.R. 333, per Irving J.; see also in addition to the cases in the text, *McDonald v. Lake Simcoe Ice and Cold Storage Co.* (1899), 26 O.A.R. 411; reversed on other grounds: (1903), 31 S.C.R. 130; *Perry v. Clerque* (1903), 5 O.L.R. 357; *Pickels v. R.* (1912), 14 Ex. C.R. 379.

78. *St. John Gas Light Co. v. R.* (1895), 4 Ex. C.R. 326.

79. See, *inter alia*, *Holman v. Green* (1881), 6 S.C.R. 707; *Attorney-General of Canada v. Attorney-General of Ontario*, [1898] A.C. 700; *Attorney-General of Canada v. Ritchie Contracting and Supply Co.*, [1919] A.C. 999; *R. v. Attorney-General of Ontario and Forrest*, [1934] S.C.R. 133.

80. *Maxwell v. R.* (1917), 17 Ex. C.R. 97; *Sisters of Charity v. R.* (1919), 18 Ex. C.R. 385.

81. *Kennelly v. Dominion Coal Co.* (1903-4), 36 N.S.R. 495.

82. *Holman v. Green* (1881), 6 S.C.R. 707.

83. *Nash v. Newton* (1891), 30 N.B.R. 610; see also *Holman v. Green* (1881), 6 S.C.R. 707; *Attorney-General of Canada v. Ritchie Contracting and Supply Co.* (1915), 52 S.C.R. 78, per Duff J.

84. *Rickey v. City of Toronto* (1914), 30 O.L.R. 523; *Attorney-General of Canada v. Ritchie Contracting and Supply Co.* (1915), 52 S.C.R. 78, per Duff J.

85. *R. v. Jalbert*, [1938] 1 D.L.R. 721; *Attorney-General of Canada v. Higbie*, [1945] S.C.R. 385.

86. *Attorney-General of British Columbia v. Canadian Pacific Ry.*, [1906] A.C. 204; *Attorney-General of Canada v. Higbie*, [1945] S.C.R. 385.

87. *Montreal v. Montreal Harbour Commissioners*, 1926 A.C. 299; *R. v. Jalbert*, [1938] 1 D.L.R. 721; *Attorney-General of Canada v. Higbie*, [1945] S.C.R. 385.

88. See *Fader v. Smith* (1885), 18 N.S.R. 433; *Attorney-General of British Columbia v. Esquimalt and Nanaimo Ry.* (1899), 7 B.C.R. 221; *Attorney-General of Canada v. Higbie*, [1945] S.C.R. 385, per Rand J., at pp. 430-1; *contra*: *Attorney-General of Canada v. Ritchie Contracting and Supply Co.* (1914), 20 B.C.R. 333, per Macdonald C. J. A., at pp. 347-8.

89. (1888), 2 Ex. C.R. 30.

90. (1918), 56 S.C.R. 499.

province before Confederation had granted water lots in the harbour of Quebec subject to a right in the Crown to repossess them on complying with certain conditions. It was held that since these lots were in a public harbour, this right of repossession had been transferred to the Dominion. Since the lots were not being used by the public for harbour purposes, the cases assume that the test of user is not required in the case of the harbour beds. But even if this is so, it does not avoid the problem of drawing a line of demarcation between a harbour and provincial lands in cases where the adjacent subsoil belongs to the province. Assuming the test is not pre-Confederation use, the line of demarcation would have to be determined by geographical features, and possibly the traditional use and attitude of the inhabitants of the area regarding the matter would be taken into consideration.

The Dominion may under its legislative power relating to navigation and shipping extend the ambit of the public harbour and legislate concerning it as a harbour, but this gives it no property right.⁹¹ However, the Dominion may for navigation purposes acquire parts of harbours or new harbours by conveyances or expropriation.⁹²

The Dominion right over a public harbour is not merely a franchise; it is a property right.⁹³ This raises several problems relating to the ownership of the bed.⁹⁴ Ordinarily ownership of the bed includes the right of fishing in the overlying waters, and despite the fact that the Supreme Court of Nova Scotia in *Young v. Harnish*⁹⁵ expressed the opinion that the fisheries in public harbours were not necessarily transferred with the harbours, this seems the most sensible approach in the case of public harbours. True it is arguable that the Dominion duty of conservancy of harbours does not make it essential that it own the fisheries, but complete proprietary rights to the fish in public harbours would simplify the position with no serious loss to the province. The Quebec Court of Queen's Bench, Appeal Side, took the view that the Dominion owned the fisheries in public harbours in *Re Quebec Fisheries*.⁹⁶

So far as underlying minerals are concerned, the Supreme Court of Canada in *Holman v. Green*⁹⁷ supports the view that they belong to the Dominion, and this was followed by Martin J. A. of the Supreme Court of British Columbia in *Attorney-General of British Columbia v. Esquimalt and Nanaimo Ry.*⁹⁸ However, the Privy Council in the *Fisheries*⁹⁹ case subsequently took a far more restrictive view of Dominion ownership than that in *Holman v. Green*. It reversed the view in the latter case that all foreshores within the ambit of a harbour belonged to the Dominion whether used as a public harbour or not; however, the Board said

91. *Montreal v. Montreal Harbour Commissioners*, [1926] A.C. 299.

92. *Ibid.*; this is discussed more fully at pp. 37-8.

93. *Holman v. Green* (1881), 6 S.C.R. 707; see also *Attorney-General of Canada v. Keefer* (1889), 1 B.C.R. (pt. 2) 368.

94. See Chapter Ten.

95. (1904), 37 N.S.R. 213.

96. (1917), 35 D.L.R. 1.

97. (1881), 6 S.C.R. 707.

98. (1889), 7 B.C.R. 221.

99. *Attorney-General of Canada v. Attorney-General of Ontario*, [1898] A.C. 700.

nothing about the harbour bed, so that *Holman v. Green*, though weakened, may still be looked on as authority.

Assuming the Dominion owns the ordinary minerals in a public harbour, the same result does not necessarily apply to precious metals, i.e., gold and silver. At common law, precious metals are not vested in a landowner but belong to the Crown as a prerogative right, a royalty, distinct from the land.¹⁰⁰ By section 109 of the British North America Act all royalties were retained by the provinces, so it would seem to follow that they continue to belong to the provinces. However, in *Holman v. Green*,¹⁰¹ two judges, Strong and Fournier JJ., thought the transfer of public harbours to the Dominion carried prerogative as well as proprietary rights pertaining to the harbours. But the *Precious Metals*¹⁰² case before the Privy Council throws great doubt on this position of *Holman v. Green*. There the Board held that the conveyance of the "land" in the Railway Belt by British Columbia to the Dominion included all ordinary incidents to land such as ordinary minerals, but not "precious metals"; these were not incidents to land, but royalties, and therefore continued to be vested in the province. This seems the most practical disposition of the problem, for the determination of whether the federal or provincial government owns a royalty, which includes escheats,¹⁰³ could only be determined by a search of the title to the land to see whether the Dominion or the province last owned it. The cases indicate that escheats are always provincial.

Finally the harbours that have been judicially considered to fall within section 108 of the British North America Act in the Atlantic Provinces are the following: Halifax,¹⁰⁴ Sydney,¹⁰⁵ St. Margaret's Bay,¹⁰⁶ Barrington Passage,¹⁰⁷ and Getson's Cove in La Have River,¹⁰⁸ in Nova Scotia; Newcastle,¹⁰⁹ Bathurst,¹¹⁰ and Dark Harbour,¹¹¹ Grand Manan, in New Brunswick; and Summerside,¹¹² in Prince Edward Island. The status of Annapolis Harbour¹¹³ is doubtful. There are others, of course, as there are within Term 33 of the Newfoundland Terms of Union, whose status has not been raised in the courts, and still others, like that of Saint John, New Brunswick,¹¹⁴ which, though not public harbours at Confederation, were subsequently acquired by the federal government.¹¹⁵ As already mentioned, the determination that a harbour is a public harbour does not define boundaries of the

100. *Attorney-General of British Columbia v. Attorney-General of Canada* (1889), 14 A.C. 295.

101. (1881), 6 S.C.R. 707.

102. *Attorney-General of British Columbia v. Attorney-General of Canada* (1889), 14 A.C. 295

103. *Attorney-General of Ontario v. Mercer* (1882-3), 8 A.C. 767.

104. *Maxwell v. R.* (1917), 17 Ex. C.R. 97; *Sisters of Charity v. R.* (1919), 18 Ex. C.R. 385.

105. *Kennelly v. Dominion Coal Co.* (1903-4), 36 N.S.R. 495.

106. *Fader v. Smith* (1885), 18 N.S.R. 433; *Sword v. Sydney & Louisburg Railway Co.* (1891), 23 N.S.R. 214; 21 S.C.R. 152; *Young v. Harnish* (1904), 37 N.S.R. 213.

107. *Anderson v. R.* (1919), 59 S.C.R. 379.

108. *Zwicker v. La Have Steamship Co.* (1911), 9 E.L.R. 144.

109. *Attorney-General of New Brunswick v. Town of Newcastle and Flett* (1947), 19 M.P.R. 365.

110. *Lunt v. Lloyd* (1881), 21 N.B.R. 203.

111. *Nash v. Newton* (1891), 30 N.B.R. 610.

112. *Holman v. Green* (1881), 6 S.C.R. 707.

113. *Pickels v. R.* (1912), 14 Ex. C.R. 379.

114. *St. John Gas Light Co. v. Reg.* (1895), 4 Ex. C.R. 326.

115. A list of those claimed by the Dominion appears in the predecessor to this work *Water Resources of the Atlantic Provinces*, vol. IV, Appendix, Part II, Federal Materials, pp. 1-4 (the work was published for the Atlantic Development Board in 1969).

harbour, and it is still not clear exactly what rights are conveyed by the transfer. Accordingly, it would be advisable to enter into federal-provincial agreements to settle precisely what the public harbours are and defining the rights of the federal government thereto as has been done in relation to the Ontario and British Columbia harbours.¹¹⁶

Item 3 in the Third Schedule, "Lighthouses and Piers, and Sable Island", like its counterpart in Term 33, "wharves, breakwaters and aids to navigation", has not been subject to examination by the courts. Neither has the next item, "Steamboats, Dredges, and Public Vessels", which is in any event spent, and the equivalent item in Term 33 and other items of a perishable nature need no further examination.

But item 5 of the Third Schedule, "Rivers and Lake Improvements", requires further mention. In a number of early cases it was argued that, because of the plural form of "rivers", what was intended to be conveyed was the whole rivers and the improvements in lakes, but the contention has been rejected;¹¹⁷ the "s" appears to have been added through some inadvertence at the drafting stage.¹¹⁸ The extent of the interest acquired by the Dominion in river and lake improvements has been discussed in *R. v. Attorney-General of Ontario and Forrest*.¹¹⁹ There it was argued that a cribwork erected on an island in a public harbour to fortify an icebreaker placed across a river was either a river improvement or a harbour work belonging to the Dominion by virtue of section 108 of the British North America Act. It was not necessary for the court to express an opinion on the point because it was not established that the cribwork actually existed at confederation, but the members of the court nonetheless did so. They all thought the cribwork, if it existed at Confederation, would belong to the Dominion either as a harbour work or as a river improvement. Moreover, Duff C. J. thought the Dominion was entitled to at least as much subsoil as was necessary to give the Dominion free scope in exercising its responsibilities in connection with such work, but the other judges thought the Dominion would at most obtain an easement of the island. All, however, rejected the argument that the whole island would belong to the Dominion.

Finally, in *Re Provincial Fisheries*¹²⁰ before the Supreme Court of Canada it was argued that "Lands set apart for general Public Purposes", in item 10 of the Third Schedule included the Great Lakes and other navigable waters, but the context certainly indicates otherwise and the court, in rejecting the Dominion's claim, did not even trouble to deal with the point. The result would apply to the similar general phrase in paragraph (j) of Term 33.

116. For British Columbia, see P.C. 941 of June 7, 1924; O. in C. No. 507 of May 6, 1924 (B.C.); for Ontario, see (1962-3), 11 & 12 Eliz. II, c. 95 (Ont.); (1963), 12 Eliz. II, c. 39 (Can.); these agreements are discussed in La Forest, "The Meaning of 'Public Harbours' in the Third Schedule to the British North America Act, 1867" (1963), 41 Can. Bar Rev. 519, at pp. 534-7; La Forest, *Natural Resources and Public Property Under the Canadian Constitution* (Toronto, 1969), pp. 65-8.

117. *Steadman v. Robertson* (1879), 18 N.B.R. 581 (reversing *Robertson v. Steadman* (1876), 16 N.B.R. 621); *R. v. Robertson* (1882), 6 S.C.R. 52, per Gwynne J.; *Attorney-General of Canada v. Attorney-General of Ontario*, [1898] A.C. 700.

118. *Steadman v. Robertson* (1879), 18 N.B.R. 581, at p. 598; *In re Provincial Fisheries* (1895), 26 S.C.R. 444, at p. 565.

119. [1934] S.C.R. 133.

120. (1895), 26 S.C.R. 444.

The conflicting claims of the federal and provincial governments to offshore mineral rights will be discussed in Chapter Twenty Two in so far as they relate to coastal waters.

Navigation and Shipping

Introduction

Section 91(10) of the British North America Act, 1867, gives the Dominion exclusive power to legislate respecting "Navigation and Shipping". This power is abetted and qualified by a number of other specific heads of section 91. Section 91(9) gives it legislative jurisdiction over "Beacons, Buoys, Lighthouses, and Sable Island", section 91(11) over "Quarantine and the Establishment and Maintenance of Marine Hospitals", and section 91(13) over "Ferries between a Province and any British or Foreign Country or between Two Provinces". Also relevant is Dominion power over "Sea Coast and Inland Fisheries" to be examined later. But most important is section 91(29) which empowers the Dominion to legislate over subjects expressly excepted from provincial legislative power. This refers to section 92(10) of the Act which gives the provinces exclusive legislative power over local works and undertakings other than those falling within the following classes:

- (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and Other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;
- (b) Lines of Steam Ships between the Province and any British or Foreign Country;
- (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Two or more of the Provinces.

Sections 91(29) and 92(10) will receive further examination later, but certain aspects are so fully intertwined with the subject of navigation and shipping that they must receive attention here. Finally, it should be mentioned that by virtue of section 108 a number of items in the Third Schedule respecting navigation and shipping are transferred to the Dominion, and these thereby come under the Dominion's legislative power over its public property (section 91(1A)). The same is true of similar items in Term 33 of the Terms of Union with Newfoundland. The Dominion's power over its public property has, however, already received attention.

It is not really possible to arrive at the meaning of any legislative head of power independently of other heads, and indeed, of other parts of the British North America Act, but for clarity of analysis some attempt must be made to isolate them.

Navigation

Looking first at section 91(10), it has been stated that the power to legislate respecting navigation and shipping must be broadly construed.¹²¹ In so far as navigation itself is concerned, this would include power to regulate and prohibit it. The Dominion may also legislate to prevent any interference with navigation, as it has

121. See, *inter alia*, *Queddy River Driving Boom Co. v. Davidson* (1883), 10 S.C.R. 222; *Montreal v. Montreal Harbour Commissioners*, [1926] A.C. 299; *Validity and Applicability of The Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529.

done for example under the Navigable Waters Protection Act,¹²² even so as to prevent the operation of a work authorized under provincial legislation, such as a boom for logs, or a mill whose waste products impede navigation.¹²³ In fact the Dominion government has a duty of conservancy of harbours,¹²⁴ and may, even without legislation, obtain an injunction against a person whose activities impede or are likely to impede navigation.¹²⁵ Federal legislative power respecting navigational aids is not left to chance. Section 91(9) expressly gives the Dominion power to legislate respecting "Beacons, Buoys, Lighthouses and Sab'e Island", facilities which along with other navigational works such as public harbours, canals and river and lake improvements were transferred to the Dominion by the combined effect of section 108 and the Third Schedule to the British North America Act.

Merely because a work has some connection—even a close connection—with navigation and shipping does not necessarily make it fall within section 91(10). In the *Montreal Harbours* case,¹²⁶ for example, the Privy Council carefully distinguished between dredging and other operations necessary to navigation on the one hand, and such works as embankments and a railway on the shore of a river, quays, a dry dock and ship repairing plant. It is true that the case was concerned with the compulsory taking of land for harbour purposes—a very special exercise of legislative power—but it nonetheless goes some way towards establishing a line, however hazy, between federal and provincial power.

The power under section 91(10) includes the power to regulate, protect and prohibit, if so desired, the public right of navigation.¹²⁷ This right will be examined in more detail later. Here it suffices to say that in England the public has from time immemorial had the right to navigate navigable tidal waters, whether on the open seas or on tidal streams.¹²⁸ This public right exists in Canada and, in some provinces at least, has been judicially construed to apply to all waters that are *de facto* navigable, whether tidal or not.¹²⁹ This modification has not yet been applied to the Atlantic Provinces but it may well be in the future.¹³⁰ Whatever its extent, however, the public right is subject to regulation by the federal Parliament.

The power to regulate navigation is not limited to regulating the public right existing at common law; the Dominion may act to improve navigation, by constructing or authorizing the construction of any work for the purpose.¹³¹ Thus where a river is navigable as to its general character natural interruptions to navigation at some parts of it which can be readily overcome do not prevent it from being deemed a navigable river at such parts, and so give the Dominion power to

122. *Attorney-General of Canada v. Attorney-General of Quebec*, [1898] A.C. 700; see also *Attorney-General of Canada v. Brister*, [1943] 3 D.L.R. 50.

123. *Queddy River Driving Boom Co. v. Davidson* (1883), 10 S.C.R. 222; *Re Brandon Bridge* (1884), 2 Man. L.R. 14; *Reg. v. Fisher* (1891), 2 Ex. C.R. 365; see also *Underwater Gas Developers Ltd. v. Ontario Labour Relations Board* (1960), 24 D.L.R. 673.

124. *Holman v. Green* (1881), 6 S.C.R. 707, *per Strong J.*

125. *Attorney-General of Canada v. Ritchie Contracting and Supply Co.*, [1919] A.C. 999.

126. *Montreal v. Montreal Harbour Commissioners*, [1926] A.C. 299; see also *Reference re Waters and Water-Powers*, [1929] S.C.R. 200.

127. *Attorney-General of British Columbia v. Attorney-General of Canada*, [1914] A.C. 153.

128. *Ibid.*

129. See, *inter alia*, *In re Provincial Fisheries* (1895), 26 S.C.R. 444; this question is discussed in detail at pp. 178-9.

130. See pp. 179-80.

131. *Booth v. Lowery* (1917), 57 S.C.R. 421.

remove obstructions.¹³² The power to improve navigation also includes the right to authorize the storage of water to render navigation possible,¹³³ though Duff J. (dissenting) in *Booth v. Lowery*¹³⁴ had some doubt that this could be done where the navigation was local in a particular province. Clement J. thought that Parliament could, even without compensation, take and establish as public waterways of navigation such waterways as it thought fit, though he was doubtful if this could be done on provincial lands where the public right of navigation did not already exist.¹³⁵ This caveat, however, was made at a time when the Privy Council took a narrower view of federal powers of expropriation than it was later to uphold.¹³⁶

Dominion power to construct or authorize the construction of works for the advantage of navigation may be exercised even though the construction may result in damage to the land of a third person.¹³⁷ But an intent to take away or injure another person's property without compensation is not to be imputed, unless unequivocally expressed. Thus in *Smith v. Ont. and Minnesota Power Co.*,¹³⁸ a statute authorized the defendant to build a dam to assist the transmission of logs on a river. In 1916 the water was very high—though not so high as to be unexpected—and the plaintiff's property was flooded as a result of the existence of the dam, and the defendant was held liable. The statute, in fact, made it clear that it did not absolve the defendant from such liability, but the court said liability would in any event not be removed by mere authorization of the work in the absence of clear words to the contrary.

In *Reg. v. Rice*,¹³⁹ Jasperson M. stated that navigation and shipping must encompass usage in navigation in accordance with the development of water. He there held that anti-noise regulation in respect of outboard motors fell within section 91(10). The same may perhaps be said of hovercraft operating over water.

Floatability

The right of navigation must be distinguished from the right to float logs. The right of floatability does not exist in England, except perhaps by prescription,¹⁴⁰ though it does exist in Canada, either by statute as in Newfoundland¹⁴¹ or by virtue of a local variation to the common law as in New Brunswick.¹⁴² There is some authority that the right falls within the legislative authority of the provinces,¹⁴³ and the sharp distinction drawn in many cases between public rivers (i.e., those subject to the public right of navigation) and private rivers, including those capable

132. *Arrow River Slide and Boom Co. Ltd. v. Pigeon River Co. Ltd.*, [1932] S.C.R. 495, *per* Lamont J.

133. See *Booth v. Lowery* (1917), 54 S.C.R. 421.

134. *Ibid.*

135. *Fort George Lumber Co. v. Grand Trunk Pacific Ry. Co.* (1915), 24 D.L.R. 527.

136. See pp. 37-8.

137. *Booth v. Lowery* (1917), 54 S.C.R. 421.

138. (1918), 45 D.L.R. 266.

139. [1963] 1 C.C.C. 108.

140. *Caldwell v. McLaren* (1884), 9 A.C. 392.

141. Crown Lands Act, R.S.N., 1952, c. 174, ss. 82, 83, 84; see also Transportation of Timber Act, 1904, 4 Edw. VII, c. 13 (Nfld.); the subject is discussed in detail at pp. 310-5.

142. See, *inter alia*, *Roy v. Fraser* (1903), 36 N.B.R. 113; the subject is discussed at pp. 191-5.

143. *McMillan v. The Southwest Boom Co.* (1883), 10 S.C.R. 222.

of floating logs, would appear to support this result.¹⁴⁴ Three judges of the Supreme Court of Canada in *Upper Ottawa Improvement Co. v. Hydro-Electric Power Commission*¹⁴⁵ thought the right to float was merely an aspect of the right of navigation, but the remaining six judges thought the right in Ontario was wholly dependent on pre-Confederation statutes and so, apparently, quite separate from the public right of navigation. It is, in any event, clear that the provinces may incorporate log driving and boom companies, at least where the driving is confined to the province,¹⁴⁶ even in waters forming the boundary between the province and another province or a foreign country.¹⁴⁷ But a different problem arises where the driving of logs takes place from or to a foreign country or another province as occurs on the Saint John River. It is certainly arguable that this falls within federal jurisdiction under the "Trade and Commerce" power.¹⁴⁸ Moreover, under the Ashburton-Webster Treaty the forest and agricultural produce grown in parts of Maine watered by that river or its tributaries are to have free access on the river to the seaport at its mouth and while within New Brunswick is to be treated as if it were New Brunswick produce.¹⁴⁹ Since this is an Empire treaty, under section 132 of the British North America Act the Dominion has executive and legislative power to give effect to it.¹⁵⁰ The province might also pass legislation to give effect to this power. It is true that in the *Aeronautics* case there is a statement that indicates that legislation to implement an Empire treaty would fall exclusively within the federal domain.¹⁵¹ However, this should be read in the light of the subsequent views expressed in the Supreme Court of Canada case of *Arrow River Slide and Boom Co. v. Pigeon River Timber Co.*¹⁵² that provincial legislation would be valid even if it contravened the provisions of an Empire treaty unless the treaty was implemented.

Thus far floatability has been treated as distinct from navigation, and this is perfectly proper; there are rivers that are floatable though not navigable. On such rivers it would appear the provinces have the exclusive right to regulate floating to the exclusion of federal power over navigation and shipping. But logs may also be floated on navigable rivers, and the problem of conflicting federal and provincial power arises. On the one hand, the right of floating may be looked upon as merging with the right of navigation,¹⁵³ leaving no scope for the operation of provincial laws. On the other hand, provincial laws respecting floatability may be permitted to operate concurrently with federal laws. If this is the case, where there is conflict

144. See, *inter alia*, *Reg. v. Robertson* (1882), 6 S.C.R. 52; *Caldwell v. McLaren* (1884), 9 A.C. 392, *In re Provincial Fisheries* (1895), 26 S.C.R. 444; see generally the cases on the right of floatability at pp. 191-5.

145. [1961] S.C.R. 486.

146. *McMillan v. The Southwest Boom Co.* (1878), 17 N.B.R. 715; *Queddy River Driving Boom Co. v. Davidson* (1883), 10 S.C.R. 222; *Smith v. Ont. and Minnesota Power Co.* (1919), 45 D.L.R. 266; *Arrow and Tributaries Slide and Boom Co. v. Pigeon Timber Co.* [1932] S.C.R. 495.

147. *Arrow River and Tributaries Slide and Boom Co. v. Pigeon Timber Co.*, [1932] S.C.R. 495.

148. See *Paquet v. Pilots' Corporation (Quebec)*, [1920] A.C. 1029.

149. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States and other Powers, 1776-1909* (Washington, 1910) vol. 1, pp. 650 *et seq.*

150. See *In re The Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54.

151. *Ibid.*, at p. 74.

152. [1932] S.C.R. 495, *per* Lamont J.

153. See *North West Navigation Co. v. Walker* (1885), 3 Man. L.R. 25; see also *Ireson v. Holt Lumber Co.* (1913), 18 D.L.R. 604.

federal legislation will prevail.¹⁵⁴ Moreover, a provincial statute cannot interfere with the public right of navigation, even in the absence of federal legislation. The leading case is *Queddy River Driving Boom Co. v. Davidson*.¹⁵⁵ There the company was incorporated to erect booms on the Quidy River to facilitate the driving of logs. Professing to act under that power it impeded navigation in part of the river which was tidal and navigable, and Davidson sued for damages resulting to him from the obstruction. The Supreme Court of Canada held that it was within the province's power to incorporate boom companies, but it could not authorize the obstruction of navigation; such obstruction could only be authorized by Parliament. The manner of proceeding in such cases is to obtain power from the province to construct the work, but to apply for permission under the Navigable Waters Protection Act whenever navigation might be affected. A similar course should be followed in relation to other local works such as bridges.

Provincial Statutes Interfering with Navigation

The inability of a province to authorize interferences with navigation has appeared in other contexts. For example, while a province may authorize the building of booms in navigable waters and incorporate a company to do so, any piers or other obstructions to navigation must be authorized by Parliament.¹⁵⁶ The same is true of bridges,¹⁵⁷ as well as mills causing gradual encroachments and thus interfering with navigation.¹⁵⁸ Similarly municipal anti-noise¹⁵⁹ and anti-smoke¹⁶⁰ laws have been held not to apply to ships in a harbour within a municipality since they may interfere with the navigation of vessels. While the principle of these cases is correct, it is suggested that courts should satisfy themselves by evidence that such laws substantially interfere with navigation and not simply assume this is the case. More doubtful is the decision that a province cannot authorize searches of yachts or other ships to ascertain whether there has been a violation of the provincial liquor Act.¹⁶¹

Shipping

Section 91(10) permits federal legislative activity in a number of areas more germane to shipping than to navigation though in some cases, it is difficult to tell under which term a particular matter falls. Falling more naturally under "shipping" are such matters as the licensing of ships, seaworthiness, the qualifications of seamen and the like.¹⁶² It also includes the power to regulate the pilotage system, including the control and management of pilots, the collection of dues and the remuneration of pilots.¹⁶³ Shipping also includes the loading and unloading of

154. See *Booth v. Lowery* (1917), 54 S.C.R. 421, *per* Anglin J.

155. (1883), 10 S.C.R. 222; see also *McMillan v. The Southwest Boom Co.* (1878), 17 N.B.R. 715.

156. See *Queddy River Driving Boom Co. v. Davidson* (1883), 10 S.C.R. 222; see also *Ireson v. Holt Lumber Co.* (1914), 18 D.L.R. 604.

157. *Re Brandon Bridge* (1884), 2 Man. L.R. 14; see also *Melbourne v. McQuesten*, [1940] O.W.N. 311.

158. *Reg. v. Fisher* (1891), 2 Ex. C.R. 365.

159. *Reg. v. Rice*, [1963] 1 C.C.C. 108.

160. *Reg. v. C.S.L. Ltd.*, [1960] O.W.N. 277.

161. *Fleming v. Spracklin* (1921), 64 D.L.R. 382.

162. See *Reference Re Waters and Water-Powers*, [1929] S.C.R. 200.

163. *Paquet v. Pilots' Corporation (Quebec)*, [1920] A.C. 1029.

goods, even where these are done by a separate organization of stevedores. This was the view of a majority of the Supreme Court of Canada in *Validity and Applicability of the Industrial Relations and Disputes Investigation Act* (the *Stevedores* case).¹⁶⁴ In that case it was also held that the work of the office staff of such organizations also comes within federal jurisdiction, but it seems reasonably certain from the reasoning of the judges that this was owing to the combined effect of sections 91(29) and 92(10) rather than section 91(10). The organization in that case, on the facts assumed, was solely engaged in loading and unloading ships plying from ports within the province to ports outside the country. It was therefore an undertaking extending beyond the confines of the province.

Inter-relation of Federal and Provincial Powers

While section 91(10) speaks of navigation and shipping *simpliciter*, other heads of power, section 91(13) and sections 91(29) and 92(10) combined, indicate that some jurisdiction is left to the provinces over local shipping. It has been held on several occasions that the grant under section 91(13) of jurisdiction to the federal Parliament relating to international and interprovincial ferries by implication leaves to the provinces jurisdiction over intra-provincial ferries either under section 92(8) municipal institutions), section 92(10) (local works or undertakings), section 92(13) (property and civil rights) or section 92(16) (local or private matters).¹⁶⁵ This, however, would still leave some operation for federal power. Thus in *Toronto Transit Commission v. Aqua Taxi Ltd.*¹⁶⁶ Gale J. expressed the view that while the power to provide a municipal ferry came within provincial power properly delegated to a municipality, the Dominion might yet have control over its navigation. Kellock J. in the *Stevedores*¹⁶⁷ case thought the granting of franchises of purely local ferries and such matters as their schedules, rates and the control of traffic thereon fell within provincial competence, but that section 91(10) was not otherwise encroached upon. Cartwright J. probably agreed with this; he said that over intraprovincial lines of ships the provinces had jurisdiction, but the actual operations of ships and whatever was essential to transportation by ship was within federal power. So, too, Rand J., who in his dissenting judgment took a narrower view of federal power than the majority, nonetheless thought the government of the ship, including qualifications and discipline of the crew and all matters relating to navigation, remained with Parliament. One further point respecting ferries should be made. Since section 91(13) vests legislative jurisdiction over international and interprovincial ferries in the Dominion notwithstanding anything in the Act, it overrides section 109 of the British North America Act which transfers all royalties to the provincial government. The granting of a franchise to operate a ferry was a prerogative of the Crown, i.e. a royalty, but it is obvious

164. [1955] S.C.R. 529.

165. *Longueuil Navigation Co. v. City of Montreal* (1888), 15 S.C.R. 566, *per* Fournier J.; *Dinner v. Humberstone* (1896), 26 S.C.R. 264; *Owen Sound Transportation Co. v. Tackaberry*, [1936] 3 D.L.R. 272; *Validity and Applicability of The Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529; *Toronto Transit Commission v. Aqua Taxi Ltd.* (1956), 6 D.L.R. (2d) 721.

166. (1956), 6 D.L.R. (2d) 721.

167. *Validity and Applicability of The Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529.

from section 91(13) that it was not intended to leave this power to the provinces in relation to ferries extending beyond a province.¹⁶⁸

Paragraphs (a) and (b) of section 92(10) are also worded in such a way as to indicate that intraprovincial lines of ships, railways, canals, telegraph or other works or undertakings are subject to provincial regulatory power in the same way as local ferries. This was recently settled by the Supreme Court of Canada in *Agence Maritime Inc. v. Conseil canadien des relations ouvrières*.¹⁶⁹ It had been a foregone conclusion since the *Stevedores* case,¹⁷⁰ where a majority of the judges were of the opinion that shipping wholly within the province came within provincial regulatory power. But federal power to legislate respecting navigation of intraprovincial lines of ships remains; the boundary between federal and provincial power in this regard appears to be the same as in the case of provincial ferries. This line may not be easy to draw as the few cases on the matter indicate. Thus in *Loughead v. Shackleton*¹⁷¹ the Ontario Court of Appeal, without giving reasons, held that section 208 of the Canada Shipping Act which exempts the wages of "seamen" from attachment applies to seamen on ships on inland or minor voyages wholly within a province. This was followed, though with reluctance, by the Supreme Court of Prince Edward Island in *R. v. Hamill*,¹⁷² where the thought was expressed that the section was designed to enable a ship operator to retain the services of a competent crew. This, however, appears to be more closely related to shipping than navigation, and where provincial shipping is involved this would seem to fall within provincial power. Slightly more difficult, but also doubtful, is *R. v. Pacific Coyle Navigation Co.*,¹⁷³ where Orr D.P.M. held that a provincially incorporated navigation company whose ships are covered by the Canada Shipping Act respecting the seamen thereon is not subject to the Annual Holidays Act of British Columbia. His view was that while hours of labour and holidays were normally matters of civil rights, such legislation might interfere with watches and otherwise impede the management of a ship.

It is obvious that in some situations the power of the federal Parliament to legislate under section 91(10) or under sections 91(29) and 92(10) combined must on occasion involve the necessity of balancing these powers with provincial powers such as property and civil rights, a balancing made all the more difficult by the fact that local ferries and shipping, in some aspects at least, fall within provincial power under section 92(10) as local undertakings. The courts have had difficulty in achieving a comfortable balance. In the first case on the matter in 1920, *Paquet v. Pilots' Corporation (Quebec)*,¹⁷⁴ the Privy Council held that the Dominion might validly regulate respecting the payment and conditions of employment of pilots even though this might entrench on their property and civil rights. Yet a month later in *Workmen's Compensation Board v. Canadian Pacific*

168. *In re International and Interprovincial Ferries* (1905), 36 S.C.R. 206.

169. [1969] S.C.R. 851.

170. *Validity and Applicability of The Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529; see also *Underwater Gas Developers v. Ontario Labour Relations Board* (1960), 24 D.L.R. (2d) 673; affirming (1960), 21 D.L.R. (2d) 345.

171. [1955] O.W.N. 922.

172. (1961), 27 D.L.R. (2d) 61.

173. [1949] 3 D.L.R. 157.

174. [1920] A.C. 1029.

*Railway*¹⁷⁵ the Board upheld the British Columbia Workmen's Compensation Act in its application to employers and employees in relation to a ship plying between ports in British Columbia and ports in the United States, even though the employers were a Dominion company and the accident occurred outside British Columbia waters. The Board seems to have looked upon the provision for compensation as a statutory term of the contract falling within provincial jurisdiction over civil rights.¹⁷⁶

The *Pilot's* case and the *Workmen's Compensation* case could, of course, have been reconciled by saying that unless the field was occupied by federal legislation, provincial legislation would be valid. But this approach began to be closed with the *Stevedore's* case,¹⁷⁷ where the preponderance of *dicta* favoured the view that legislation respecting an extraprovincial undertaking is wholly outside provincial competence. Then in *Commission du Salaire Minimum v. Bell Telephone Co.*,¹⁷⁸ the Supreme Court of Canada finally settled the matter. The question there was whether the Quebec Minimum Wage Act applied to the Bell Telephone Co., an undertaking falling under section 92(10)(a) of the British North America Act. Following the views of Abbott J. in the *Stevedores* case it concluded that labour relations and conditions of labour and the like were vital parts of the management and operation of any commercial and industrial undertaking, and so in the case of undertakings falling within federal legislative competence, these matters fell to be regulated by Parliament and not the provincial legislatures. It distinguished the *Workmen's Compensation* case on the ground that, despite the reference to a "satisfactory condition of employment", what was at issue there was a right given by statute which differed from a statute dealing with matters, which apart from such legislation, would have been the subject of contract between employer and employee, e.g., rates of pay or hours of work.

Further problems arise in determining with precision what activities fall within an undertaking. In the *Stevedores* case the question was whether the federal Industrial Relations and Disputes Investigation Act or the Ontario Labour Relations Act (both of which dealt with strikes, collective bargaining, conciliation, etc.) applied to certain employees. The employees in question were engaged by a firm which on the facts assumed were solely engaged in loading and unloading ships plying between ports in Ontario and ports outside Canada. The court held, Rand J. dissenting, that the federal Act applied to the stevedores on the ground that loading and unloading constituted an essential part of the firm's undertaking which, according to all the judges, was an extra-provincial undertaking within sections 91(29) and 92(10). Moreover a majority (Taschereau, Kellock, Locke, Cartwright and Fauteux JJ.) thought the Act was applicable to the stevedores under section 91(10) of the British North America Act. A majority also held (Rand and Locke JJ. dissenting) that the federal Act also covered office employees doing the necessary office work related to the firm's business, which it must be remembered was

175. [1920] A.C. 184.

176. For a similar approach, see *Sincennes-McNaughton Lines Ltd. v. Bruneau*, [1924] S.C.R. 168.

177. *Validity and Applicability of The Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529.

178. [1966] S.C.R. 767; see also *Swait v. Board of Trustees of Maritime Transportation Unions* (1966), 61 D.L.R. (2d) 317; *Agence Maritime Inc. v. Conseil Canadien des relations ouvrières*, [1969] S.C.R. 851.

assumed to be engaged solely in loading and unloading ships plying between ports in Ontario and ports abroad. The reasoning of the judges is clear that the conclusion regarding office workers was based on the combined effect of sections 91(29) and 92(10). In fact, Kellock, Locke, Fauteux and probably Cartwright JJ. would have come to a different conclusion if the undertaking had been engaged exclusively in local shipping.

That the law will be subjected to further refinements is evident from subsequent cases. In *Underwater Gas Developers v. Ontario Labour Relations Board*¹⁷⁹ the question again was whether the federal Industrial Relations and Disputes Investigation Act or the provincial Labour Relations Act applied. There the company's operations consisted of the establishment and servicing of sites for drilling gas under water. This involved drilling wells at sites indicated to the company. The company set up a tower and platform at the selected sites, the tower being brought there by a barge and crane unit. The company also used a diving boat and work boats for the necessary work involved, which included the laying of a pipe line from a well to a meter house on shore, and it also maintained certain facilities on shore. Sub-contractors using their own employees did the actual drilling and the company's operations ended when gas flowed. The boats and their officers were licensed under the Canada Shipping Act and approval was given to perform the work under the Navigable Waters Protection Act. On these facts the Ontario Court of Appeal held that the Ontario Labour Relations Act, and not the federal Act, applied to relations of the company with its employees. The company's operations fell within sections 92(10) and (16) of the British North America Act; they were purely local. They did not fall within navigation and shipping (section 91(10)) nor in the exceptions in section 92(10) (extra-provincial undertakings). Though there was some navigation and some shipping, these were merely incidental to the major activity, i.e. the establishment and servicing of well sites. The court stressed that in the *Stevedores* case the court had been concerned with the business of stevedoring, whereas here what was involved was the business of establishing and servicing well sites.

The case was distinguished in *Reg. v. Nova Scotia Labour Relations Board, Ex Parte J. B. Porter Co. Ltd.*¹⁸⁰ There a union sought certification by the Nova Scotia Labour Relations Board as bargaining agent for certain employees of the company employed at its Dartmouth depot. The main work of the company was dredging, marine construction and salvage, and its operations were scattered all over eastern Canada. The company operated 17 dredges, 21 tugs and 40 other craft such as scows and lighters. The Dartmouth Depot was operated solely for maintaining, repairing and rehabilitating the company's dredges and other craft. Cowan C.J.T.D. held that the company's relation with its employees was subject to the federal Industrial Relations and Disputes Investigation Act, and not the Nova Scotia Trade Union Act, and accordingly the Nova Scotia board had no right to certify the union. The case differed from the *Underwater Gas Developers* case in that in the earlier case the main object of the company was one falling

179. (1960), 24 D.L.R. (2d) 673.

180. (1968), 68 D.L.R. (2d) 613.

within provincial legislative competence; moreover, the company's operations there were of a purely local nature.

A further problem came up for discussion before the Quebec Court of Queen's Bench, Appeal Side, in *Reg. v. Picard, Ex p. International Longshoremen's Association*¹⁸¹ where the validity of a special Act of the federal government settling the conditions of labour of the members of a union who were engaged in shipping operations was raised. In view of the *Stevedores* case there could be no question of the validity of the Act if the union members were engaged wholly in connection with ships engaged in interprovincial trade. It was suggested, however, that because some members of a local affiliated with the union worked for separate enterprises and undertakings engaged in intraprovincial shipping, they could not be subject to federal authority under section 92(10), but Hyde J. (Rinfret J. concurring) held there were certain aspects of the operation that could not admit of divided responsibility, and where this was so federal legislation under section 92(10) would apply and predominate over provincial legislation. But it appears to have been assumed that where a distinction could be made, provincial legislation would operate.

Expropriation

One of the most serious conflicts of federal and provincial power arises in relation to compulsory taking.¹⁸² The first case to discuss the matter in relation to navigation and shipping is *Montreal v. Montreal Harbour Commissioners*.¹⁸³ Montreal harbour had by virtue of section 108 of the British North America Act been transferred to the Dominion at Confederation. Subsequent federal statutes had extended the harbour and purported to convey to the Commissioners title to this extended area. The Privy Council held that while the Dominion had power to extend the harbour and make provision for the control of shipping in the harbour as extended, in so far as the statutes purported to vest the solum of the harbour in the Dominion or the Commissioners without compensation, they were *ultra vires*. In a later passage, however, the Board stated that it might well be that the Dominion had power to authorize the compulsory acquisition of land when the interests of navigation require it, on terms of paying compensation.

However, the facts of the case must be carefully borne in mind in considering the import of these expressions. The Commissioners had there undertaken extensive works which had some connection with navigation and shipping but which may have been regarded as not falling strictly within the power. The Board carefully distinguished the dredging operations from the embankment and railway, quays and the dry dock and ship repairing plant. The case is certainly open to the interpretation that the works did not fall within section 91(10), however broadly construed, so that expropriation for these purposes was invalid. Certainly in *Attorney-General of Quebec v. Nipissing Central Railway Co.*¹⁸⁴ the Board in permitting expropriation of land for railway purposes under sections

181. (1968), 65 D.L.R. (2d) 658.

182. For a more detailed discussion, see La Forest, *Natural Resources and Public Property Under the Canadian Constitution* (Toronto, 1969); see also pp. 39-41.

183. [1926] A.C. 299.

184. *Attorney-General of Quebec v. Nipissing Central Ry.*, [1926] A.C. 715.

91(29) and 92(10) seemed only to demand as a condition of validity that it be necessary to acquire the land so as to effectually exercise the power respecting railways; the Board drew no distinction between the various heads of section 91. As far as the obligation to pay compensation referred to in the *Montreal Harbours* case, the Board may have meant a legal obligation but it may also have meant an honourable obligation. On the other hand in the next case, *Reference re Waters and Water Powers*,¹⁸⁵ Duff J., giving the judgment of the court, seems to suggest that some of the purposes mentioned in the *Montreal Harbours* case may be ancillary to section 91(10), and that it is the exercise of this ancillary power that is conditional on the payment of compensation.

It is clear in any event that the Dominion may expropriate land for the purpose of erecting interprovincial and international canals by virtue of sections 91(29) and 92(10) even in the case of provincial lands. This power was mentioned in the *Water Powers* reference, and in *Lazare v. St. Lawrence Seaway Authority*,¹⁸⁶ the Authority was held competent to expropriate lands in an Indian reserve even though the underlying title to the land belonged to the province.

Sea Coast and Inland Fisheries

One of the most important federal powers respecting water is that given by section 91(12) of the British North America Act to legislate respecting "Sea Coast and Inland Fisheries". While any regulation of fishing or the fisheries falls within the ambit of this power, any attempt to legislate upon matters not falling squarely within that head under the guise of regulating fisheries is *ultra vires*.¹⁸⁷ Thus enactments prescribing the times and places where fishing is permissible, the instruments to be used, the manner of fishing, and licensing provisions constitute valid provisions respecting fisheries.¹⁸⁸ So too are ancillary provisions prohibiting the possession of fish which may not lawfully be caught.¹⁸⁹ But a federal statute purporting to authorize a grant of an exclusive fishery to a person in waters where the bed is owned by another has been held by the Supreme Court of Canada in *Reg. v. Robertson*¹⁹⁰ to be legislation respecting property and civil rights rather than fisheries and so *ultra vires*. Again, in the *Fish Canneries*¹⁹¹ case a federal statute prohibiting the operation of a fish cannery or curing establishment without a federal licence was also held invalid as dealing with property and civil rights, and not fisheries.

Despite the inability of the Dominion to legislate respecting property and civil rights, even where the subject matter is closely related to fisheries, however, the Privy Council in the *Fisheries* case¹⁹² has made it clear that if federal legislation is truly legislation respecting fisheries it may powerfully affect proprietary rights. Obviously legislation directing the times when, and the manner in which

185. [1929] S.C.R. 200.

186. [1957] Que. S.C. 5.

187. See *Attorney-General of Canada v. Attorney-General of British Columbia*, [1930] A.C. 111.

188. See *Attorney-General of Canada v. Attorney-General of Ontario*, [1898] A.C. 700, at pp. 712-3.

189. See, for example, *R. v. Tomasson*, [1932] 2 D.L.R. 679; *Reg. v. Wold* (1956), 19 W.W.R. 75, where this is not even questioned.

190. (1882), 6 S.C.R. 52.

191. *Attorney-General of Canada v. Attorney-General of British Columbia*, [1930] A.C. 111.

192. *Attorney-General of Canada v. Attorney-General of Ontario*, [1898] A.C. 700.

a landowner may fish on his land seriously affects his proprietary rights, but it is nonetheless valid as legislation respecting fisheries. In the *Fisheries* case, the Privy Council went so far as to say that the exercise of the power would be valid even if it amounted to a practical confiscation of property.

If in exercising its legislative power over fisheries the federal Parliament may effect a practical confiscation of property, it would seem to follow that it could also expropriate land if clearly required for a scheme falling squarely within the power: and this it is suggested could be done even without paying compensation,¹⁹³ though the courts would lean against this, and express words might be required in the legislation to circumvent the Canadian Bill of Rights.¹⁹⁴ This conclusion may be looked upon as conflicting with *Reg. v. Robertson*, but this is not necessarily so. That case involved, in effect, the taking away of a property right, a landowner's right to fish on his land, and giving it to another by granting him an exclusive licence to fish there; it is not easy to see how this could enure to the benefit of fisheries. However, if it were necessary for the development or conservation of a particular type of fishery for the federal authorities, or a single person or body, to exercise control of that type of fishing, it is possible that expropriation measures would be permissible, and so possibly would the vesting in one person or body of all rights to fish in an area even though it was privately owned. However, this would require a very strong case for it comes dangerously close to conferring on others property rights where the Dominion has none itself, a situation thought to be invalid by the Privy Council in the *Fisheries* case.¹⁹⁵ But subsequent cases, to be discussed in a moment, have tended to expand somewhat the federal power of expropriation.

The foregoing discussion has presupposed that private property was being affected or expropriated under legislation respecting fisheries, not provincial property. In the *Reference re Waters and Water Powers*,¹⁹⁶ Duff J., relying on such cases as the *Fisheries* case and *Reg. v. Robertson*, thought the federal authorities could not expropriate lands owned by the provinces under its legislative power over fisheries, even though they could under some other heads of power, such as the federal legislative power over railways. The distinction he drew was that the federal power over railways could not be effectively exercised without the power of expropriating lands of the provinces, which constituted a substantial part of all lands in Canada at Confederation, but this was not true of fisheries legislation. In truth, the Privy Council case upholding federal legislation expropriating provincial lands for railway purposes, *Attorney-General of Quebec v. Nipissing Central Ry. Co.*,¹⁹⁷ made no distinction between one head of legislative power and others or between privately owned and provincial lands. After referring to the passage in the *Fisheries* case stating that the right to legislate necessarily enabled proprietary rights to be affected, the Board added that where (as in that case) the legislative power could not effectually be exercised without affecting proprietary rights of

193. See *Attorney-General of British Columbia v. Canadian Pacific Ry.* (1904-5), 11 B.C.R. 289, at p. 304; *Fort George Lumber Co. v. Grand Trunk Pacific Ry.* (1915), 24 D.L.R. 527, at p. 528.

194. (1960), 8 & 9 Eliz. II, c. 44, ss. 1(a), 2 (Can.).

195. *Attorney-General of Canada v. Attorney-General of Ontario*, [1898] A.C. 1970, at p. 713.

196. [1929] S.C.R. 200.

197. [1926] A.C. 715.

individuals or a province, the power to so affect the rights was necessarily involved in the legislative power.¹⁹⁸ From this case the test seems to be: is the taking necessary to the effectual exercise of the power?

It is obvious nonetheless that in most cases, at least, development of provincially owned fisheries will require the co-operation of the federal and provincial authorities. For example, where fishing, such as lobster fishing, requires use of subsoil belonging to the province, provincial permission will be required even though a Dominion licence has been granted.¹⁹⁹ Only in the case of ordinary fishing in tidal waters may the Dominion completely ignore provincial ownership of fisheries. That is because there has from immemorial antiquity been a right in the public to fish in tidal waters that overrides the usual exclusive common law right of the landowner to fish on his land. This right being a public, not a proprietary, right comes within the federal power to legislate respecting fisheries, and since the public right overrides the private right, there is nothing left for the provinces to legislate upon. It would require a federal statute to give an exclusive right of fishery in tidal waters. The public right of fishing, it should be repeated, is limited to ordinary fishing. It does not include fishing by weirs or other methods involving the use of the soil.²⁰⁰

Duff J. suggested a further limitation on the federal power of expropriation in the *Water-Powers* reference: that the extent of interference with provincial property must be justifiable under the power exercised; for example, if surface rights only were required for a federal project, then the Dominion could not expropriate the subsoil and minerals. On this reasoning if a fishery was required, presumably only the fishing rights, and no others, could be taken under section 91(12). Duff J.'s reasoning was that unless the federal expropriation power was thus limited, the Dominion could take over an area of provincial legislative jurisdiction. The same might be said of privately owned lands but Duff J. did not deal with this. The qualification seems unduly restrictive; it is one thing for the courts to prevent the Dominion from attempting to legislate on a provincial matter under the guise of fishery legislation; it is another to artificially restrict federal power so as to fragment ownership of land once it is decided that a scheme is proper. There is no other authority for Duff J.'s approach, though the manner in which the courts have fragmented ownership of public harbours gives some support to his view.²⁰¹

There is also authority for the view that under certain circumstances, at least, the Dominion is constitutionally obliged to pay compensation if it expropriates lands belonging to a province. In the *Montreal Harbour* case²⁰² the Privy Council made the statement that compensation had to be paid on the Dominion's taking provincial lands under its power over navigation and shipping. The Supreme Court of Canada

198. *Ibid.*, at p. 724.

199. *Attorney-General of British Columbia v. Attorney-General of Canada*, [1914] A.C. 153; *Attorney-General of Canada v. Attorney-General of Quebec*, [1921] 1 A.C. 413.

200. *Ibid.*

201. *Attorney-General of Canada v. Ritchie Contracting and Supply Co.*, [1919] A.C. 999; see pp. 23-7; for a more detailed examination, see La Forest, "The Meaning of 'Public Harbours' in the Third Schedule to The British North America Act, 1867" (1963), 41 Can. Bar Rev. 519; La Forest, *Natural Resources and Public Property Under the Canadian Constitution* (Toronto, 1969), pp. 60-3.

202. *Montreal v. Montreal Harbour Commissioners*, [1926] A.C. 299.

later interpreted this as applying to an ancillary use of a power,²⁰³ not to a scheme falling squarely under an enumerated power.²⁰⁴ It is, however, possible to give the Privy Council statement another interpretation. It may well have been referring to an honourable, as opposed to a legal, obligation to pay compensation. There is support for this approach from an analogous situation. In *St. Catherine's Milling and Lumber Co. v. Reg.*²⁰⁵ the Privy Council had stated that a province to whom the legal title to Indian lands had reverted on the surrender of the Indian title to the Crown was under an obligation to reimburse the Dominion for compensation paid to the Indians for the surrender, which the Dominion alone could accept. But in a later case the Privy Council referred to the obligation as merely an honourable one.²⁰⁶

As will be seen later, the provinces also have a great measure of legislative power over fisheries located on lands owned by the provinces under section 92(5) which empowers them to legislate respecting provincial lands.²⁰⁷ This is, of course, a most important power, given the vast areas of land still belonging to the provinces. However, the doctrine of paramountcy makes federal legislation prevail over provincial legislation.²⁰⁸ Accordingly in case of conflict, federal legislation respecting fisheries will prevail over provincial legislation relating to provincially owned fisheries, as it does over provincial legislation under other heads. Just what is meant by conflict, however, gives rise to difficulty. Does this mean that whenever the Dominion has legislated in an area, it displaces provincial legislation, or does it demand that the legislation of the two bodies be inconsistent with one another? Authorities in other fields now suggest that only in the latter case will provincial legislation be displaced.²⁰⁹ Thus if a federal regulation imposes a fishing season, and the province imposes a shorter fishing season on its lands, both regulations are valid, so that during the period of overlap a person could be prosecuted under both federal and provincial laws and during the period when the provincial prohibition alone applies, under provincial laws. The same would probably occur in the opposite case, but a permission by the province to fish on its lands during the federal prohibition would be void.

Provincial legislation would also be invalid if a federal statute was so written as to indicate that it was intended to cover the whole field. However, in the light of the more recent approach by the courts it is suggested that such a construction would not lightly be taken.

203. *Reference re s. 189 Railway Act*, [1926] S.C.R. 163 (affirmed, *sub nom*, *Attorney-General of Quebec v. Nipissing Central Ry.*, [1926] A.C. 715, see esp. at p. 724); *Reference re Waters and Water-Powers*, [1929] S.C.R. 200.

204. The logical weakness of the ancillary powers doctrine is spelled out by Laskin, *Canadian Constitutional Law*, 3rd ed. (Toronto, 1966), pp. 101-4, and it will probably die out.

205. (1889), 14 A.C. 46, at p. 60.

206. *Dominion of Canada v. Province of Ontario*, [1910] A.C. 637, at pp. 646-7.

207. This is discussed below under Provincial Lands.

208. For a discussion of paramountcy, see Laskin, *Canadian Constitutional Law*, 3rd ed. (Toronto, 1966), pp. 104 et seq; see also Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1962-3), 9 McGill L. J. 185; Laskin, "Occupying the Field; Paramountcy in Penal Legislation" (1963), 41 Can. Bar Rev. 234.

209. See *Provincial-Secretary of Prince Edward Island v. Egan and Attorney-General of Prince Edward Island*, [1941] S.C.R. 396; *Lord's Day Alliance v. Attorney-General of British Columbia*, [1959] S.C.R. 497; *R. v. Yolles* (1959), 19 D.L.R. (2d) 19; *Smith v. Reg.*, [1960] S.C.R. 776; *O'Grady v. Sparling*, [1960] S.C.R. 804; *Mann v. Reg.*, [1966] S.C.R. 238; *McIver v. Reg.*, [1966] S.C.R. 254.

In addition, where federal and provincial provisions are not inconsistent, but substantially identical, the authorities until recently have appeared to favour the view that the Dominion legislation displaces the provincial.²¹⁰ The only authority in this field, *R. v. Wagner*,²¹¹ before the Manitoba Court of Appeal supports this position, though in view of recent developments favouring the co-existence of both legislation, the case must be looked at with some caution. There the accused was convicted of being unlawfully in possession of sturgeon under a Manitoba statute prohibiting its possession at a time when the catching of sturgeon was prohibited by law, and establishing a closed season for sturgeon in the province of the same period as federal regulations. On appeal the question raised was whether the accused was properly convicted under the provincial statute while the federal regulations were in force. A majority held the conviction void. Prendergast C.J.M., with whom Richards J.A. and apparently Dennistoun J.A. agreed, thought the province had no power to establish a closed season, since this was legislation respecting fisheries. But such legislation may be upheld as legislation relating to provincial lands, so this reasoning is not helpful. Dennistoun J.A., with whom Richards J.A. also agreed, also appears to support his judgment by the doctrine that once the Dominion has occupied a field, provincial legislation is displaced. However, as already mentioned, this is not in line with recent cases on paramountcy. The dissenting judgment of Robson J.A., therefore, is preferable. He thought the provincial legislation valid as dealing with the management of provincial lands. A recent statement by Martland J. in the Supreme Court of Canada would seem to indicate that federal legislation will not displace otherwise valid provincial legislation by reason only that they are substantially identical.²¹²

Finally, it should be added that where the Dominion owns lands on which there is water, it is not limited to legislation respecting fisheries or navigation or other such head of power; for it is then the owner of the exclusive right to fish, and it can legislate in any way it wishes because by section 91(1A) it has exclusive jurisdiction to legislate respecting its property.²¹³

Indian Lands

Section 91(24) of the British North America Act, 1867 gives the Dominion legislative power to legislate respecting "Indians and Lands Reserved for the Indians". In many parts of Canada the nature of the Indian title in reserved lands dates from the Royal Proclamation of October 7, 1763, which reserved vast tracts of lands in Canada for the use of Indians.²¹⁴ The effect of this proclamation according to the Privy Council in *St. Catherine's Milling and Lumber Co. v. Reg.*²¹⁵ was to vest in the Indians a usufructuary title in the lands reserved, the underlying title thereto remaining in the Crown. The exact nature of the usufructuary title has never been fully defined, but it would appear to be related to the Indian mode

210. See *Lymburn v. Mayland*, [1932] A.C. 318, at pp. 326-7; *Home Insurance Co. v. Lindal & Beattie*, [1934] S.C.R. 33, at p. 40.

211. [1932] 3 D.L.R. 679.

212. *Smith v. Reg.*, [1960] S.C.R. 776, at p. 800.

213. See pp. 18-21.

214. See R.S.C., 1970, Appendices, p. 123.

215. (1889), 14 A.C. 46.

of life,²¹⁶ though some federal-provincial agreements have been entered into under the assumption that the Indians could benefit from royalties from mining operations.²¹⁷ The proclamation gave the Indians no authority to transfer the lands, though they could surrender them to the Crown—which was usually done for a monetary compensation—when it completely reverted in the Crown in the same way as other Crown lands. Nowadays under the Indian Act the Indians have considerable power to dispose of lands possessed by them to other Indians, but the relinquishment of the Indian title can still be made only to the Crown.²¹⁸

It seems doubtful if the proclamation ever applied to the Atlantic provinces. Certainly it never applied to Newfoundland,²¹⁹ and since there are no reserves there the following discussion is irrelevant to that province. There is one case in New Brunswick, *Warman v. Francis*,²²⁰ where Anglin J. of the Supreme Court of New Brunswick held that the proclamation applied to the province. However, New Brunswick does not seem to fall within the lands described in the proclamation, so this seems doubtful. However, the question is academic, for in an earlier case in the Appeal Division of the Supreme Court of New Brunswick, *Doe d. Burk v. Cormier*,²²¹ it was held that while the proclamation did not affect New Brunswick, the reserves established there were of the same character.

The latter view is borne out by historical evidence, for in 1762 the Governor of Nova Scotia (then including New Brunswick and Prince Edward Island) issued a proclamation under Royal Instructions giving similar treatment to Indian reserves as was later done in the 1763 proclamation.²²² This means that the reserves in the Maritimes were in a similar position as those in other parts of Canada. The situation in Nova Scotia and New Brunswick has now been altered by federal-provincial agreements, but it is still necessary to see what the situation was at Confederation because there has been no such agreement in Prince Edward Island and some of its reserves are still governed by the general constitutional position.

Before Confederation, the beneficial interest and administration of Crown lands in the Atlantic Provinces were transferred to the provinces,²²³ so that for practical purposes the provinces owned the underlying title to Indian lands at Confederation.²²⁴ Section 91(24) of the British North America Act giving legislative powers over Indian reserves to the federal Parliament carried with it the right to the administration and control over Indian lands, but it did not affect the underlying title of the provinces.²²⁵ The allocation of property under the British North America Act is not effected by sections 91 and 92, but by Part VIII of the Act. Among the sections in that Part is section 109 which provides that all lands, mines, minerals and royalties belonging to the provinces at Union should continue to

216. See *ibid.*, at pp. 54-5; see also *Lazare v. St. Lawrence Seaway Authority*, [1957] Que. S.C. 5.
217. See, for instance, (1943), 7 Geo. VI, c. 19 (Can.).

218. R.S.C., 1970, c. I-6, ss. 24, 25.

219. *In the Matter of the Boundary Between the Dominion of Canada and the Colony of Newfoundland in the Labrador Peninsula*, [1927] 2 D.L.R. 401.

220. (1960), 20 D.L.R. (2d) 627.

221. (1891), 30 N.B.R. 142.

222. See *Warman v. Francis* (1960), 20 D.L.R. (2d) 627.

223. (1837), 8 Wm. IV, c. 1 (N.B.); R.S.N.B., 1854, tit. 3, c. 5; (1849), 12 & 13 Vict., c. 1 (Imp.): 13 Vict., c. 3 (P.E.I.); R.S.N., 1872, tit. XIII, c. 45, s. 16.

224. *St. Catherine's Milling and Lumber Co. v. Reg.* (1889), 14 A.C. 46.

225. *Attorney-General of Canada v. Attorney-General of Ontario*, [1897] A.C. 199.

belong to them, but this was made subject to "any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same." The Privy Council held in the *St. Catherine's Milling* case²²⁶ that the effect of this section was to retain for the provinces the underlying title to Indian lands, but the Indian usufructuary title was preserved by the quoted words. The Dominion, therefore, has the legislative and executive power over Indian lands. This includes the power to accept surrenders of the land on behalf of the Indians, but when the Indian title is thus ceded, the province's underlying title is all that remains, and the federal legislative and administrative power over the lands as "Lands reserved for Indians" disappears. In fact in one case, *Ontario Mining Co. v. Seybold*,²²⁷ the Dominion accepted a surrender of land in return *inter alia* for a promise to establish smaller reserves on the land. In intended compliance with this it appropriated parts of the land, but the Privy Council held the lands belonged to the province and the Dominion could not do this. This may give the impression that the Dominion may not expropriate provincial lands for the purposes of reserves,²²⁸ and this may well be the case. But it is suggested, for reasons already given,²²⁹ that if expropriation is necessary to an effectual exercise of federal power under section 91(24), it may possibly be exercised. In the *Seybold* case, the Dominion simply acted on the basis that it could deal with the land without regard to the provincial title.

Federal legislative and executive power over Indian reserves is very broad, so that any dealing with waters and water rights over Indian lands will require federal intervention. It is by no means clear, however, that provincial assistance may not be necessary for any important development. For if, as seems to be the case, the usufructuary title relates to the Indian mode of life, the federal government could not, for example, undertake hydro-electric development, and in any event the federal government cannot ignore the province's underlying title. Between the two levels of authority, however, there is complete power to deal with the lands, for the federal Parliament,²³⁰ and possibly the federal government, without statutory authorization,²³¹ could even abolish the Indian title. *A fortiori*, the federal Parliament may negate or modify Indian hunting and fishing rights.

On the other hand, a province without federal co-operation cannot initiate the development of water resources on Indian reserves, because this would interfere with the usufructuary right of the Indians, legislative and executive jurisdiction over which is wholly vested in the federal government.²³²

In New Brunswick and Nova Scotia, the Dominion is no longer limited to its powers under section 91(24) of the British North America Act, but may legislate over Indian reserves as public property under section 91(1A). That is because New Brunswick²³³ in 1958 and Nova Scotia²³⁴ in 1959 entered into agreements

226. *St. Catherine's Milling and Lumber Co. v. Reg.* (1889), 14 A.C. 46.

227. [1903] A.C. 73.

228. See *Reference re Waters and Water-Powers*, [1929] S.C.R. 200.

229. See pp. 37-8.

230. See *Sikyee v. Reg.*, [1964] S.C.R. 642; *Reg. v. George*, [1966] S.C.R. 267.

231. See *St. Catherine's Milling and Lumber Co. v. Reg.* (1889), 14 A.C. 46, at pp. 53-4; the grant under the 1763 proclamation, at least, was made during the pleasure of the Queen.

232. See, for example, *R. v. Jim* (1915), 26 C.C.C. 236.

233. 7 Eliz. II, c. 4 (N.B.).

234. 7 & 8 Eliz. II, c. 50 (Can.); 8 Eliz. II, c. 3 (N.S.).

with the federal government under which all provincial rights and interests of the provinces were transferred to the Dominion except lands under public highways and minerals. However, if an Indian band becomes extinct, the Dominion is to revert in the province the reserved lands occupied by the band before its extinction, but a band does not become extinct by enfranchisement. Moreover if the lands are surrendered for sale, the province has the right of first purchase at a price to be agreed or settled by arbitration. In Prince Edward Island, two of the reserves, Morell Reserve and Scotch Fort Reserve, are governed by the general constitutional principle, since the underlying title belonged to the province at Union. However, the Lennox Island Reserve was acquired by the Dominion from the Anti-Slavery and Aborigines Protection Society in 1912, and the Rocky Point Reserve was purchased from the owner of the land in 1913; accordingly the province would not have the underlying title to these reserves.²³⁵

When the Indians surrendered lands to the Crown, this was done by treaty which usually provided for compensation. This compensation it has been held, is not tied to the land, so that it is not a trust or interest to which provincial lands are subject under section 109 of the British North America Act and, since jurisdiction over Indians is in the federal government, the Crown's obligation in this regard must be met by the federal government subject to reimbursement if the amount paid by the Dominion for the province's pre-existing debts exceed an amount mentioned in the British North America Act.²³⁶ Oftentimes, however, in addition to compensation, there is an understanding in these treaties that the Indians who have surrendered the lands, and their progeny, will have certain rights to hunting and fishing on such lands.²³⁷ Authority is divided on whether or not this constitutes a limitation on provincial legislative power by virtue of section 109.²³⁸ At the moment, the question is academic because the Indian Act provides that while provincial laws of general application apply to Indians, this is made subject to any treaty or any Act of Parliament.²³⁹ Such a provision comes within section 91(24) of the British North America Act because special privileges given to Indians, such as hunting and fishing rights, constitute legislation respecting Indians.²⁴⁰ Accordingly, the provinces are unable by legislation directly to deprive the Indians of these hunting and fishing rights,²⁴¹ though the effect of some projects may well destroy the object of the right, i.e., the fisheries or forests.

235. For this information, I am grateful to H. G. Wallace, Special Land Services, Department of Indian Affairs and Northern Resources; letter to J. R. Lane of June 18, 1970.

236. See *Attorney-General of Canada v. Attorney-General of Ontario*, [1897] A.C. 199; see British North America Act, 1867, 30 & 31 Vict., c. 3, ss. 111, 114, 115 (Imp.).

237. Many of the Indian treaties are reproduced in *Indian Treaties and Surrenders* (Ottawa), vols. I, II (1905), and III (1912).

238. *Dicta* in *St. Catherine's Milling and Lumber Co. v. Reg.* (1889), 14 A.C. 46, at p. 60, and in *Ontario Mining Co. v. Seybold*, [1903] A.C. 73, at p. 79 appear to consider that provincial legislation cannot interfere with such rights, but in *R. v. Commanda*, [1939] 3 D.L.R. 635 it was held they could, and there are *dicta* in *Reg. v. Sikyea* (1964), 43 D.L.R. (2d) 150, at p. 154 (affirmed: *Sikyea v. R.*, [1964] S.C.R. 642) that appear to support this. For a discussion, see La Forest, *Natural Resources and Public Property Under the Canadian Constitution*, (Toronto, 1969), pp. 84, 118-20, 177-9.

239. Now R.S.C., 1970, c. I-6, s. 88.

240. See *Reg. v. George*, [1966] S.C.R. 267.

241. *Reg. v. Strongquill* (1965), 8 W.W.R. (N.S.) 247, at pp. 265, 271; *Reg. v. White and Bob* (1965), 50 D.L.R. (2d) 613 *per* Norris J.

Works and Undertakings

Introduction

Section 92(10) of the British North America Act, 1867, gives to the provinces exclusive legislative power over local works and undertakings, but makes certain exclusions.²⁴² The section reads as follows:

10. Local Works and Undertakings other than such as are of the following classes:—

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;

(b) Lines of Steam Ships between the Province and any British or Foreign Country;

(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of two or more Provinces.

The exclusions are by virtue of section 91(29) of the Act placed within the exclusive jurisdiction of the Dominion as if they were expressly enumerated in section 91.²⁴³ Section 91(29) reads as follows:

29. Such classes of subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

These provisions can be of great importance in relation to water resources. For example, water pipelines may "connect" two provinces or "extend" beyond the limits of a province. So too may canals and electric lines from hydro-power developments. And, indeed, a hydro-electric generating plant could be so constructed as to be brought within that description apart altogether from its connecting systems for the distribution of electricity. All these fall within federal legislative jurisdiction. Furthermore a "work" for the development of water resources, even though entirely situate within a province, may be made the subject of a declaration by Parliament that it is for the general advantage. Apart from this, purely provincial operations for the development of water resources would fall within provincial legislative competence by virtue of the opening words of head 10.

Most of the cases, however, have had little to do with water resources. The most frequent undertakings that have raised problems under this head are lines of ships and railways, but a few cases have dealt with electric power companies and there are *dicta* relating to canals.²⁴⁴ But all the cases must be examined to see what light they throw on works and undertakings relating to water resources.

The opening words of section 92(10) place within provincial jurisdiction purely local works such as mines.²⁴⁵ This would include intra-provincial canals and lines of ships as well as local ferries.²⁴⁶

242. For a recent examination of the section see Colin H. McNairn, "Transportation, Communication and the Constitution, the Scope of Federal Jurisdiction" (1969), 47 Can. Bar Rev. 355. Cases holding works to be provincial include *McGregor v. Esquimalt and Nanaimo Ry.*, [1907] A.C. 462; *Toronto Transit Commission v. Aqua Taxi Ltd.* (1956), 6 D.L.R. (2d) 221; *Underwater Gas Developers Ltd. v. Ontario Labour Relations Board* (1960), 24 D.L.R. (2d) 673; *Le Procureur Général du Canada v. Les Services d'Hôtellerie Maritime Ltée.*, [1968] C.S. 431.

243. *Montreal v. Montreal Street Railway*, [1912] A.C. 333; *Attorney-General of Alberta v. Attorney-General of Canada*, [1915] A.C. 363; *Attorney-General of Ontario v. Winner*, [1954] A.C. 541.

244. *Reference re Waters and Water-Powers*, [1929] S.C.R. 200.

245. *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580; see also *Attorney-General of Ontario v. Winner*, [1954] A.C. 541.

246. See pp. 33-4.

Extra-provincial Works and Undertakings

Paragraph (b) has already been dealt with in relation to Navigation and Shipping, and it is largely with paragraphs (a) and (c) that we are concerned. Turning to paragraph (a), while the matters therein purport to be an exception to "Local Works and Undertakings", it is evident from the language that inter-provincial and international works and undertakings are included. Indeed only such works and undertakings are covered; the words "connecting the Province with other . . . provinces" and "extending beyond the limits of the provinces" apply to the enumerated works such as lines of ships as well as to other works and undertakings.²⁴⁷ The words "works and undertakings" must be read disjunctively, so that a work may come within federal competence without being connected with an undertaking and *vice versa*.²⁴⁸ Thus in the *Winner* case²⁴⁹ an interprovincial bus-line was held to fall within provincial competence; it was an undertaking, even if the term "works" did not apply to buses.²⁵⁰ Conformably with this it has been held that the words "lines of" are limited to "lines of ships", which connote an undertaking, as well as works.²⁵¹ Consequently railways and canals would not be limited to the mere railway and canal works but other things connected with the undertaking. Thus in the case establishing this proposition it was stated that provision of meals and places of rest for persons travelling on a railway line could be part of a railway undertaking.

So much for the interrelation of the various parts of the paragraph. We must examine in more detail the meaning to be attributed to the expressions that have given the most difficulty, i.e. "works", "undertakings", and "connecting" two provinces and "extending" beyond a province.

The first important statement regarding "works" is that in the *Montreal Street Railway* case²⁵² where it was stated that "works" in paragraph 10(c) referred to physical things, not services, so traffic on a local railway connecting with an intercontinental line could not be declared for the general advantage, though the railway could have been. At first glance the word "works" would seem to include such facilities as canals,²⁵³ workings such as mines,²⁵⁴ operations such as mills and factories.²⁵⁵ In some situations the relation of an operation to a work or undertaking may have a bearing. Thus in the *Winner* case²⁵⁶ the Privy Council did not seem to think buses would be covered by the term, though in *Quebec Ry.*

247. *Canadian Pacific Railway v. Attorney-General of British Columbia*, [1950] A.C. 122; see also *Reg. v. Thumlert* (1960), 20 D.L.R. (2d) 335.

248. *Attorney-General of Ontario v. Winner*, [1954] A.C. 541.

249. *Ibid.*

250. In *Quebec Ry., Light & Power Co. v. Beauport*, [1945] S.C.R. 16, the Supreme Court of Canada held buses at least when integrated with a railway system to be "works" under section 92(10)(c), though the Privy Council in the *Winner* case, *ibid.*, seemed to think they did not fall within "works" under section 92(10)(a).

251. *Canadian Pacific Railway v. Attorney-General of British Columbia*, [1950] A.C. 122.

252. *Montreal v. Montreal Street Railway*, [1912] A.C. 333.

253. This is mentioned in the section, and see *Reference re Waters and Water-Powers*, [1929] S.C.R. 200, and *Lazare v. St. Lawrence Seaway Authority*, [1957] Que. S.C. 5.

254. See *Union Colliery v. Bryden*, [1899] A.C. 580.

255. *Reg. v. Thumlert* (1960), 20 D.L.R. (2d) 335; see also *R. v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434.

256. *Attorney-General of Ontario v. Winner*, [1945] A.C. 541.

Light and Power Co. v. Beauport,²⁵⁷ some years before, the Supreme Court of Canada held that buses integrated with a railway system were works within head 10(c). It seems difficult to apply to real property as such; even provincial roads connecting roads to other provinces are not works.²⁵⁸ In any event it seems difficult to believe that an interprovincial or international river would fall under the description, though *R. v. Red Line*²⁵⁹ dealing with National Capital lands might afford some minor support. However, that case appears to have been based on section 91(1A), which gives the Dominion power over its public property. Booms for assistance in driving logs across international or interprovincial boundary or trans-boundary waters, however, might conceivably be held to be "works" within the heading, but this seems doubtful unless log driving under those circumstances itself falls within the head. Log driving would not, it is suggested, be a "work" but it may well be an "undertaking".

In view of the enumerated items in section 92(10) (a), it could be argued that the works are limited to those relating to interprovincial communication such as, in addition to the enumerated ones, telephone²⁶⁰ and radio,²⁶¹ community antenna television,²⁶² international or interprovincial bridges,²⁶³ and buses (for if these are not "works" they can certainly form part of an "undertaking"). This view was expressed by the Privy Council in *Canadian Pacific Ry. v. Attorney-General of British Columbia*,²⁶⁴ and all the Privy Council cases falling within the exceptions to section 92(10) (a) are limited to such works. If that were so, irrigation works and possibly works for generating and transmitting electric power not wholly situate in one province might not fall within the head, though federal regulation would be possible under the agricultural power (section 95) in relation to irrigation and under the "trade and commerce" power in respect of the transmission of electricity.

There is, however, authority in the Supreme Court of Canada that section 92(10) (a) is not limited to works relating to interprovincial communications. In *Hewson v. Ontario Power Co.*²⁶⁵ a power company authorized to connect with an American company was held to be within Dominion competence. The major ground was that this was not a company for provincial purposes, though Davies and Sedgwick JJ. thought it fell within section 92(10) (a). Moreover under section 92(10) (c), "the declaratory power", it has been held or suggested that works

257. [1945] S.C.R. 16.

258. *S.M.T. (Eastern) Ltd. v. Ruch*, [1940] 1 D.L.R. 196; see also *European and North American Ry. Co. v. Thomas* (1872), 14 N.B.R. 42.

259. (1930), 66 O.L.R. 53.

260. *Toronto Corporation v. Bell Telephone Co. of Canada*, [1905] A.C. 52 (This was looked upon as an "undertaking").

261. *In re Regulation and Control of Radio Communications in Canada*, [1932] A.C. 304.

262. *P.U.C. v. Victoria Cable Vision Ltd.* (1965), 52 W.W.R. 286; cf. *Reg., ex rel. Canadian Wirevision Ltd. v. New Westminster* (1966), 54 W.W.R. 238.

263. *Van Buren Bridge Co. v. Madawaska* (1959), 15 D.L.R. (2d) 763; but see *Reg. v. Beaver Foundations Ltd.* (1968), 69 D.L.R. (2d) 649.

264. [1950] A.C. 122, at p. 142.

265. (1905), 36 S.C.R. 596; see also *British Columbia Power v. Attorney-General of British Columbia* (1963), 44 W.W.R. 65; but see *Ottawa Valley Power Co. v. Attorney-General of Ontario*, [1936] 4 D.L.R. 594.

include power companies,²⁶⁶ grain mills and elevators²⁶⁷ and munition factories.²⁶⁸ However, it is by no means certain, notwithstanding their appearance in the same head, that "works" conjoined with "undertakings" following an enumeration of specific works in paragraph (a) necessarily has the same meaning as "works" standing alone in paragraph (c). The problem is probably unimportant, for operations connecting more than one province will often come within federal legislative power under the trade and commerce power or the "Peace, Order and Good Government" clause.

An "undertaking" was described in the *Radio* reference²⁶⁹ as not being a physical thing, but an arrangement under which physical things are used. In that case the Board found the undertaking of broadcasting to come within head 10 (a) as it had held years before of a telephone system. The definition was given in answer to the argument that in the *Montreal Street Railway* case²⁷⁰ Lord Atkinson had described works in head 10 (a) as limited to physical things. More important for our purposes is the holding of the Supreme Court of Canada in the *Comstock* case²⁷¹ that an interprovincial oil pipeline came within the description, for this would be equally applicable to pipelines for transporting water as well. Driving logs across the boundary of an international or interprovincial river or through boundary waters might well be regarded as an undertaking, though it is suggested that if this were purely ancillary to the operation of a mill that was unquestionably a local work, it might be regarded as assimilated to the operation of the mill and so part of a local work or undertaking.

It is this question of what constitutes part of the undertaking, once it has been determined that an operation is such, that has given rise to some of the most vexed questions. The point first arose in *Toronto Corporation v. Bell Telephone Co.*²⁷² where it was argued that the intraprovincial aspects of the Bell Telephone Co. did not come under federal control. But the Privy Council held that the company's telephone business constituted only one undertaking though there were, of course, local as well as extraprovincial calls. Similarly in the *Winner* case²⁷³ a company operating a busline from Nova Scotia, through New Brunswick and to Boston was held to be subject to federal regulatory control even in regard to passengers travelling from points in New Brunswick to other points in the province. It was the same undertaking; the Board noted that the same buses were used for local passengers as for long distance travellers.

The latter statement indicates that there may be situations where a single business enterprise may carry on several undertakings. This is evident from *Canadian Pacific Railway v. Attorney-General of British Columbia*²⁷⁴ where the Empress Hotel operated by the C.P.R. like any other large hotel was held to be

266. *Toronto and Niagara Power Co. v. North Toronto Corporation*, [1912] A.C. 834.

267. *Reg. v. Thumfert* (1960), 30 D.L.R. (2d) 335; see also *R. v. Eastern Terminal Elevator*, [1925] S.C.R. 434.

268. See *Luscar Collieries v. McDonald*, [1925] S.C.R. 460, at p. 488.

269. *In re Regulation and Control of Radio Communications in Canada*, [1932] A.C. 304.

270. *Montreal v. Montreal Street Railway*, [1912] A.C. 333.

271. *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd. and Trans-Mountain Oil Pipe Line Co.*, [1954] S.C.R. 207; see also *Cant v. Canadian Bechtel Ltd.* (1958), 12 D.L.R. (2d) 215.

272. [1905] A.C. 52.

273. *Attorney-General of Ontario v. Winner*, [1954] A.C. 541.

274. [1950] A.C. 122.

a separate undertaking from the company's railway operations. This by no means indicates that all aspects of a company's work must be of the same kind, as in the *Bell Telephone Co.* and *Winner* cases, to come within the same operation. In the *Empress Hotel* case the court conceded that a hotel or restaurant maintained as an adjunct to the company's railway business for the benefit of passengers travelling on its lines could certainly be part of its railway undertaking.²⁷⁵ So too, the Supreme Court of Canada has held that buslines constituting an integrated transportation system with railway lines were part of the same undertaking.²⁷⁶ But the mere fact that a company's operations are integrated in a managerial sense, or that one type of operation benefits another, is not sufficient to make what are in substance two separate operations one undertaking for the purpose of the heading. A recent illustration appears in *Reg. v. Ontario Labour Relations Board, ex p. Dunn*²⁷⁷ before the Ontario High Court. McRuer C.J.H.C. there held that the labour relations in Northern Electric's Bramalea plant came within provincial jurisdiction, though the plant was largely, if not exclusively, engaged in manufacturing cross-bar mechanisms for its parent company, the Bell Telephone Company. As one writer has pointed out, however, in assessing this decision it would be useful to know the extent of the integration of the two companies; the mere fact that the services rendered by Northern Electric could equally well have been rendered by an independent company certainly is not determinative that it is a separate undertaking.²⁷⁸

There is authority in the lower courts that in determining whether an undertaking having local, interprovincial and international aspects falls within the clause, a percentage computation of the extraprovincial to the intraprovincial operations is not to be used. Thus in *Re Tank Truck Transport Ltd.*,²⁷⁹ McLennan J. in a decision later affirmed by the Ontario Court of Appeal held that a transport company operating in Quebec, Ontario and the United States was an "undertaking" within section 92(10) (a) notwithstanding that its trips outside Ontario constituted only 6% of the total. The operations were all conducted as one, and while the trips were not according to a fixed schedule, they were made with reasonable regularity. Of course if an operation was slightly extended beyond a province with a view to ousting provincial control over what is in substance a local work, the courts would declare the attempt colourable and void. The amount of extra-provincial to intraprovincial work would certainly be a relevant factor in considering this question, but it would require weighty evidence to make the court decide that an operation was a subterfuge.

The rejection of a percentage test seems wise. What is really at stake is whether or not an undertaking truly extends beyond a province. But in *British*

275. The Board considered this to be the only possible justification for *Canadian National Ry. v. Attorney-General of Saskatchewan*, [1948] 1 D.L.R. 580.

276. *Quebec Ry., Light & Power Co. v. Beauport*, [1945] S.C.R. 16.

277. (1963), 39 D.L.R. (2d) 346; see also *Retail, Wholesale and Department Store Union v. Reitmer Truck Lines Ltd.* (1966), 57 W.W.R. 104.

278. McNairn, "Transportation, Communication and the Constitution, the Scope of Federal Jurisdiction" (1969), 47 Can. Bar Rev. 355, at pp. 377-8; the case is also discussed in Blake, *Case Comment* (1964), 3 Osgoode Hall L.J. 126.

279. (1961), 25 D.L.R. (2d) 161; affirmed: [1963] 1 O.R. 272; see also *R. v. Cooksville Magistrate's Court, Ex parte Liquid Cargo* (1965), 46 D.L.R. (2d) 700.

*Columbia Power v. Attorney-General for British Columbia*²⁸⁰ Lett C.J. went far beyond this. There the Power Co., a federally incorporated holding company, held virtually all the shares in the British Columbia Electric Co., a provincially incorporated company, which carried on operations involving the generation and distribution of electricity, the distribution of natural gas, and transportation by railway and buses. Though the railway had links with the intercontinental railway system of the C.P.R. it did not connect the province with other provinces within the meaning of section 92(10)(a). Similarly he found the gas system did not connect other provinces and the United States even though it had links with pipelines outside the province. But Lett C.J. held the electric system connected the province with the United States because it formed part of the Northwest Power Pool, a grid in the northwest of the United States, which was intended to supply electricity in one system from others when it was temporarily overloaded and through which minimal amounts of power flowed at all times, and because 7 miles of its cables for convenience ran under American territorial waters. In addition the bus system which was principally engaged in urban lines also had minor sightseeing tours going into the United States. On this basis Lett C.J. held that both the electric and bus systems extended beyond the province and the entire operations—railways, electrical system, gas system, and buses—constituted a single undertaking falling within head 10(a) and consequently within federal competence. Assuming for the moment a connection with other provinces by means of the grid and the international sightseeing tours, it seems difficult to believe the railway system should be regarded as an extraprovincial undertaking by reason only that it is operated by an organization that operates electrical and bus systems that are extraprovincial. In fact, it is possible that the sightseeing bus tours could be regarded as a separate undertaking from the urban service.²⁸¹ In any event, there may be some doubt whether these undertakings truly “connected” the province with other provinces or “extended” beyond the province within the meaning of head 10(a) and it is to an examination of these terms that we must now turn.

An interprovincial railway evidently connects one province with another, and this is one of the enumerated items under the head,²⁸² so too, and more to the point here, is an interprovincial canal.²⁸³ Similarly telegraph, telephones²⁸⁴ and broadcasting²⁸⁵ come under the heading. More important interprovincial oil and

280. (1963), 44 W.W.R. 65. The case has been criticized by Laskin, *Canadian Constitutional Law*, 3rd ed. (Toronto, 1966), pp. 586 *et seq.*; Strayer, “Constitutional Aspects of Nationalization of Industry” (1964), 7 Can. Bar Jo. 226; Yule, “Constitutional Aspects of the B.C. Power Expropriation Case” (1964), 22 U. of T. Fac. of Law Rev. 51; McNairn, “Transportation, Communication and the Constitution, the Scope of Federal Jurisdiction” (1969), 47 Can. Bar Rev. 355; Lederman, “Corporate Bodies and Public Monopolies” in Lang, *Contemporary Problems of Public Law in Canada* (Toronto, 1968), pp. 115-8 approves the case but construes its application narrowly. For criticisms of other aspects of the decision, see La Forest, *Natural Resources and Public Property Under the Canadian Constitution* (Toronto, 1969), pp. 175-6.

281. See *Re Kleysen's Cartage Co. and Motor Carrier Board* (1968), 48 D.L.R. (2d) 716; *Reg. v. Manitoba Labour Board, Ex parte Invictus* (1968), 65 D.L.R. (2d) 517; see also *Westspur Pipe Line Co. v. Gathering System* (1957), 76 C.R.T.C. 158; *Reg. v. Ontario Labour Relations Board, ex p. Dunn* (1963), 39 D.L.R. (2d) 346; *Retail, Wholesale and Department Store Union v. Reitmer Truck Lines* (1966), 57 W.W.R. 104.

282. See, *inter alia*, *Canadian Pacific Railway v. Bonsecours*, [1899] A.C. 367.

283. For references to these, see *Reference re Waters and Water-Powers*, [1929] S.C.R. 200; *Lazare v. St. Lawrence Seaway Authority*, [1957] Que. S.C. 5.

284. *Toronto Corporation v. Bell Telephone Co. of Canada*, [1905] A.C. 52.

285. *In re Regulation and Control of Radio Communications in Canada*, [1932] A.C. 304.

gas pipelines have been held to fall within section 92(10)(a)²⁸⁶ and the same would be true of interprovincial or international pipelines for transporting water. Probably any man-made system for transporting water out of the province would come under this head of power, but the natural flow of a river probably would not.

The mere fact that a work or undertaking wholly situate in one province is linked with another similar work or undertaking outside the province is not sufficient for the connection or extension outside the province contemplated by head 10(a). Thus the mere fact that provincial roads abut onto the roads of another province does not make them connecting works.²⁸⁷ Similarly a railway²⁸⁸ or pipeline²⁸⁹ will not connect by reason only that it has a link with an interprovincial operation; to do so it must somehow be organically integrated in the interprovincial system. This can lead to difficult questions as a comparison of *Luscar Collieries Limited v. McDonald*²⁹⁰ with *British Columbia Electric Railway v. Canadian National Railways*²⁹¹ shows.

In the *Luscar Collieries* case, the Collieries owned a short railway line, branching from a line which branched from the Canadian Northern Railway, which became a part of the C.N.R. By agreement with the C.N.R. both the Collieries' railway and the other branch railway were operated by the C.N.R. and traffic could pass from the Collieries' line without interruption into other provinces served by the C.N.R. The Privy Council held on these facts that the Collieries' railway came within federal jurisdiction under section 92(10)(a) of the British North America Act. It underscored, however, the fact that all three lines were under the management of the C.N.R. and stated that if the Collieries line ceased to be covered by the agreement, a different question would arise.

The question did arise in *British Columbia Electric Ry. v. C.N.R.*²⁹² There the appellant (incorporated in England, and licensed to operate in British Columbia under a provincial licence) owned the Central Park Railway, which connected the Vancouver and Lulu Island Railway (a federal railway by virtue of a declaration under section 92(10)(c)) with the lines of the C.N.R. The V. & L.I. Ry. was also operated by the appellants under agreement with the C.P.R. which held a 999 year lease to it. The Supreme Court of Canada held that the Central Park Railway did not connect the province with another. Unlike the *Luscar Collieries* case, the railways here were not operated as a single unit.

A somewhat similar problem arose in the recent case of *The Queen in the Right of the Province of Ontario v. Board of Transport Commissioners*²⁹³ before the Supreme Court of Canada. There the government of Ontario decided to operate a commuter train service, using its own rolling stock, but operating on

286. *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd. and Trans-Mountain Oil Pipe Line Co.*, [1954] S.C.R. 207; *Cant v. Canadian Bechtel Ltd.* (1958), 12 D.L.R. (2d) 215.

287. *S.M.T. (Eastern) Ltd. v. Ruch*, [1940] 1 D.L.R. 190; see also *Attorney-General of Ontario v. Winner*, [1954] A.C. 541.

288. *European & North American Ry. v. Thomas* (1872), 14 N.B.R. 42; *British Columbia Electric Ry. v. Canadian National Ry.*, [1932] S.C.R. 161; *British Columbia Power v. Attorney-General of British Columbia* (1963), 44 W.W.R. 65.

289. *British Columbia Power v. Attorney-General of British Columbia* (1963), 44 W.W.R. 65.

290. [1927] A.C. 925.

291. [1932] S.C.R. 161.

292. *Ibid.*

293. [1968] S.C.R. 118.

Canadian National Railways tracks and using the train crew of the Railways on an agency basis. The Board of Transport Commissioners, on an application before it, having declared that it had jurisdiction in respect of tolls for the proposed services, an appeal was launched to the Supreme Court of Canada on the ground, *inter alia*, that the Board had no jurisdiction because the services constituted a purely local work or undertaking. The court, however, held that the commuter services fell within section 92(10)(a) of the British North America Act, and so within federal jurisdiction. To have held otherwise it would have been necessary to hold that federal jurisdiction over interprovincial railways is limited to inter-provincial services. But constitutional jurisdiction depends on the character of the railway line and not on the service provided on it. The commuter service trains were part of the overall operations of the line on which they operated.

These decisions could, of course, apply to water pipelines or a system of dams or canals on a transboundary river not constituting an integrated system. In *British Columbia Power v. Attorney-General of British Columbia*²⁹⁴ Lett C.J.B.C. applied the reasoning of the *British Columbia Electric Railway* case to a gas system operated in British Columbia which interconnected with the pipelines of the El Paso Natural Gas Co., a system with connections to the United States and Alberta. Though the only piece of equipment through which gas could flow from one system to the other was a meter, and though the connection had been used on occasions, there were two separate systems since they were under different management. This, however, was not a mere subterfuge. Though the two pipelines had been specifically built to interconnect, they were intended largely to assist in case of emergency.

In that case, it will be remembered, Lett C.J. held that the electrical system extended beyond the province because of its connection with a grid system in the United States and because it had seven miles of cables under American territorial waters. But this question cannot be regarded as settled. It is true that there was no evidence that these extraprovincial connections were subterfuges to avoid provincial regulatory control, but it is suggested that this is by no means necessary.²⁹⁵ The question is one of substance, and on the facts in the *British Columbia Power* case, there is much to be said for the view that the electric company there was an intraprovincial one. It generated and supplied electricity only in the province. Co-operation with other electric companies by means of a grid for balancing different peak periods and for emergencies is not, it is suggested, sufficient to alter the substantial character of the electric operations. Otherwise the interconnections in power systems that exist in the Maritimes would probably make all electric companies and provincial commissions subject to federal control in relation to their intraprovincial operations. The courts in other fields have strongly acted to prevent such easy federal passage into the provincial domain.²⁹⁶ The minor extensions of the electric company's works in American territory for

294. (1963), 44 W.W.R. 65; followed: *Peace River Power Development Co. v. British Columbia Electric Co.* (1965), 47 D.L.R. (2d) 751.

295. The following analysis receives strong support from the *Bank Taxation* case, *Attorney-General of Alberta v. Attorney General of Canada*, [1939] A.C. 117.

296. *Attorney-General of Canada v. Attorney-General of Ontario*, [1937] A.C. 326; *Attorney-General of Canada v. Attorney-General of Ontario*, [1937] A.C. 355; for similar resistance to easy passage by the provinces, see *Attorney-General of Alberta v. Attorney-General of Canada*, [1939] A.C. 117.

its more convenient operations in Canada should not be permitted to alter the matter either. The Privy Council was willing to ignore such minor extensions outside provincial territory in connection with colourable attempts to evade provincial responsibility. There seems no reason why it could not equally be ignored in determining whether in pith and substance an undertaking is provincial or interprovincial in scope. Moreover provincially incorporated companies may be permitted by other authority to function outside the province;²⁹⁷ so territorial incompetence should be no problem. The grid system, itself, however may be a different matter.

Apart from the grid systems, however, do sales of electric power by a provincial hydro-electric commission to consumers outside the province, even on a relatively small scale, make the entire operation of the commission come within federal legislative jurisdiction under section 92(10)(b)? This is a very real problem. For example, the New Brunswick Electric Power Commission supplies power on a regular basis in Maine, Quebec and Nova Scotia.²⁹⁸ These arrangements constitute a relatively small part of the commission's undertaking but as already mentioned the courts do not attach weight to the percentage of an undertaking that is extraprovincial. However, on a realistic approach to the situation the courts would probably hold that such minor operations do not change the real character of the commission—which they could easily hold is in pith and substance an intraprovincial operation—any more than the acceptance of an occasional extraprovincial fare changes a local taxi business into an interprovincial operation. The actual sales themselves would, however, be subject to federal regulation under the trade and commerce power.

The pith and substance doctrine was recently applied by Matas J. of the Manitoba Court of Queen's Bench in *Reg. v. Manitoba Labour Board, Ex parte Invictus*.²⁹⁹ There a Manitoba company carried on the business of transport of general freight and horses in Manitoba, Saskatchewan, Alberta and the United States. Its intraprovincial business was operated on regular schedules, but its interprovincial work was casual, the trips being undertaken in response to requests. The interprovincial business accounted for about 5.5% of the company's gross revenue. Matas J. held that the operations were in pith and substance provincial in character. The interprovincial transport was incidental to what was essentially an intraprovincial business.

It must be said, however, that the *Invictus* case is not easily distinguishable from *Re Tank Truck Transport Ltd.* and similar cases. Perhaps the only point of distinction is that in the Manitoba case the extraprovincial business was not sufficiently "regular and continuous"—a point stressed by Matas J.—to make that part of the business any more than a casual operation like a local taxi company taking the odd trip outside a province on the request of a customer. But the criteria of "regular and continuous" operations would seem to bring into section

297. *Bonanza Creek Gold Mining Co. v. R.*, [1916] 1 A.C. 566.

298. See the following New Brunswick orders in council: 25-168 of June 2, 1925; 25-186 of Aug. 6, 1925; 27-92 of March 3, 1927; 60-1185 of Nov. 30, 1960; 63-886 of Dec. 4, 1963; 67-1039 of Nov. 1, 1967.

299. (1968), 65 D.L.R. (2d) 517; the case also refers to an unreported case in Alberta by Riley J. where he held that summer sight-seeing tours in British Columbia as a casual part of its bus operations did not convert the bus operations into an extraprovincial operation.

92(10)(a) the provincial hydro-power commissions that supply small quantities of power outside the province on a regular basis. However, this does not conclude the matter. The Privy Council in the *Winner* case, itself, noted that the question whether there is an interconnecting undertaking is dependent on all the circumstances of the case, or as Matas J. put it, such questions must be viewed from a practical aspect taking into account the realities of the situation.

Some support for the approach taken here may be found in the recent Supreme Court of Canada decision in *Agence Maritime Inc. v. Conseil Canadien des Relations Ouvrières*.³⁰⁰ There the appellant owned and operated three coastal boats attached to the port of Quebec for general cargo transport within the limits of the province, particularly between ports on the St. Lawrence River. On three exceptional circumstances the boats went twice to Toronto in 1964 and once to Nova Scotia in 1965. Moreover, when going to Gaspé the boats had, of necessity, to leave the inland waters of Canada. It was sought to establish that these facts subjected the labour relations on the vessels to federal jurisdiction. The Supreme Court of Canada, however, held that the operation constituted a provincial undertaking, and its character was not altered by the exceptional voyages outside the province or by the fact that the boats had to leave the province to go to one port in the province from another. Accordingly, the federal Industrial Relations and Disputes Investigation Act had no application to the undertaking.

It is not necessary for an undertaking to fall under head 10(a) that its facilities should actually be joined to others outside the province. A company with interprovincial or international objects need not wait until the work has gotten to the stage where there is a physical connection with other provinces. Otherwise the provinces could frustrate the extraprovincial undertakings before they become operative.³⁰¹ They have to start somewhere. Again, an undertaking need not be connected in all aspects to be a "connecting" undertaking. Thus in *Hewson v. Ontario Power Co.*³⁰² a company authorized to lay cables and wires across the United States boundary was held to be within federal competence; it could not be looked on as a company for provincial purposes even though the power was wholly generated in Ontario. This, of course, is another way of looking at the problem of what constitutes the undertaking.

Before leaving the subject it might be added that an enterprise does not by the very fact of its extensiveness and importance to Canada and that it has many interrelated operations become *ipso facto* an undertaking extending beyond the province. This argument was advanced in the *Empress Hotel case*³⁰³ where it was argued that the hotel was an extraprovincial undertaking by reason of its operation by the C.P.R. and no help was obtained by relying on the "Peace, Order and Good Government" clause.³⁰⁴ This clause has, however, more chances of being applied to new activities of obvious national concern that have developed since

300. [1969] S.C.R. 851.

301. See *Toronto Corporation v. Bell Telephone Co. of Canada*, [1905] A.C. 52; *Hewson v. Ontario Power Co.* (1905), 36 S.C.R. 596; *Attorney-General of Ontario v. Winner*, [1954] A.C. 541; see also *Colonial Bldg. & Investment Association v. Attorney-General of Quebec* (1883), 9 A.C. 157.

302. (1905), 36 S.C.R. 596.

303. *Canadian Pacific Railway v. Attorney-General of British Columbia*, [1950] A.C. 122.

304. See also *Montreal v. Montreal Street Railway*, [1912] A.C. 333.

Confederation, such as, for example, aeronautics,³⁰⁵ radio and television³⁰⁶ and possibly atomic energy.³⁰⁷

The Declaratory Power

The power granted under section 92(10)(c) is a most unusual one. It permits the federal Parliament by a simple declaration that a work is for the general advantage of Canada or for the advantage of two or more provinces to extend its legislative jurisdiction over such work.³⁰⁸ This is entirely within the discretion of Parliament; the courts cannot sit in judgment over its decision.³⁰⁹ Items declared to be for the general advantage that relate to water include the following: dams, canals, bridges, aqueducts, waterfalls, docks and harbours.³¹⁰ The courts could prevent a colourable exercise of the power, but a holding that an Act of Parliament is a sham is not lightly taken.³¹¹

When a declaration is made the effect is the same as if the work subject to the declaration were expressly enumerated in section 91.³¹² It then falls within the exclusive legislative jurisdiction of the Dominion,³¹³ and provincial jurisdiction respecting the work is ousted.³¹⁴ Or course, as in other cases, the mere fact that a work comes within federal legislative control does not take it out of the province, and provincial legislation or taxation of general application will apply thereto.³¹⁵ It should be added that the federal Parliament may, at any time, vary or repeal a declaration, and provincial jurisdiction revives accordingly.³¹⁶

The actual form a declaration must take has been the subject of considerable difference of opinion. Certainly a declaration in the form of a statute is adequate,³¹⁷ but whether lesser degrees of formality will suffice is not yet firmly settled. *Dicta* in earlier cases indicate that it need not be formal or in express terms,³¹⁸ but there has been a gradual tendency to require formality.³¹⁹ In *Hewson*

305. *In re Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54.

306. *In re Regulation and Control of Radio Communications in Canada*, [1932] A.C. 304.

307. *See Pronto Uranium Mines Ltd. v. Ontario Labour Relations Board* (1956), 5 D.L.R. (2d) 342.

308. For discussions of the declaratory power, see Vincent C. MacDonald, "Parliamentary Jurisdiction by Declaration" (1934), 1 D.L.R. 1; C.L.C. Allinson, "Parliamentary Jurisdiction by 'Declaration'" (1951), 3 D.L.A. 206; Kenneth Hanssen "The Federal Declaratory Power Under the British North America Act", (1968), 3 Man. Law Jo. 87; Andrée Lajoie, *Le Pouvoir Déclaratoire du Parlement* (Montreal, 1969).

309. *In the Matter of the Incorporation of Companies in Canada* (1913), 48 S.C.R. 311, *per* Duff J.; *Luscar Collieries v. McDonald*, [1925] S.C.R. 460, *per* Mignault J.

310. *See* Lajoie, *Le Pouvoir Déclaratoire du Parlement* (Montreal, 1969), p. 54.

311. *Reg. v. Thumlert* (1960), 20 D.L.R. (2d) 335.

312. *Quebec Ry., Light & Power Co. v. Beauport*, [1945] S.C.R. 16.

313. *Montreal v. Montreal Street Railway*, [1912] A.C. 333; *Toronto and Niagara Power Co. v. North Toronto Corporation*, [1912] A.C. 834; *Kerley v. London & Lake Erie Ry. & Transportation Co.* (1913), 13 D.L.R. 365; *Attorney-General of New Brunswick v. Canadian Pacific Ry.*, [1925] 2 D.L.R. 732; *Reference re Waters and Water-Powers*, [1929] S.C.R. 200.

314. *Wilson v. Esquimalt and Nanaimo Ry.*, [1922] 1 A.C. 202; *Attorney-General of New Brunswick v. Canadian Pacific Ry.*, [1925] 2 D.L.R. 732.

315. *Van Buren Bridge Co. v. Madawaska* (1959), 15 D.L.R. (2d) 763; *Reg. v. Thumlert* (1960), 20 D.L.R. (2d) 335; this is discussed in more detail later.

316. *Hamilton, Grimsby and Beamsville Ry. v. Attorney-General of Ontario*, [1916] 2 A.C. 583.

317. *See*, for example, *Toronto and Niagara Power Co. v. North Toronto Corporation*, [1912] A.C. 834.

318. *See Windsor & Annapolis Ry. Co. v. Western Counties Ry. Co.* (1878), 12 N.S.R. 736, at p. 414; *Ontario Power Co. v. Hewson* (1903), 6 O.L.R. 11; (1904), 8 O.L.R. 88.

319. *See* in addition to the cases in the text *Re Grand Jct. Ry. & Peterborough Co.* (1881), 45 U.C.Q.B. 302, at pp. 316-7; 6 O.A.R. 339, at pp. 341, 349. *See also Jorgenson v. Attorney-General of Canada*, [1971] S.C.R. 724.

v. Ontario Power Co.,³²⁰ two judges of the Supreme Court of Canada, Girouard and Idington JJ., thought a declaration in the preamble to an Act was sufficient, but Davies and Sedgwick JJ. disagreed. In *St. John and Quebec Ry v. Jones*,³²¹ Davies C. J. and Brodeur J. (Duff and Idington JJ. expressing no opinion) were of the view that an express declaration was necessary. In any event the court was of the view that a lease of a provincial public work to the Dominion and its subsequent operation thereby was not equivalent to a declaration. It may be wondered, however, whether in such a case the Dominion could not regulate it as public property. Finally in the *Water Powers Reference*³²² Duff J., speaking for the court, stated that the decision that a work is for the general advantage "must be evidenced and authenticated by a solemn declaration . . . by Parliament". It is suggested that the wording of sections 91(29) and 92(10)(c) requires a statutory declaration. Section 91, after all, gives legislative power—in this case legislative power to add to the subjects of federal legislation. Further, there is much to be said for the view of Brodeur J. that such declarations "should be made in express terms . . . in such a way that there should be no doubt about the will of the federal Parliament to assume legislative control over a provincial work".³²³

Two other related problems respecting the form of declaration are the degree of specification that must be given to the work and whether the declaration can be prospective. For example, could a declaration apply to all dams in the Atlantic Provinces, or all dams on the Saint John River, whether existing or hereafter to be built?³²⁴ General and prospective declarations are not infrequent in federal Acts. Thus the Railway Act,³²⁵ the Canada Grain Act³²⁶ and the Atomic Energy Control Act³²⁷ all contain such provisions. Despite these instances, until recently no definite answer could be given regarding their validity.³²⁸ In the *Luscar Collieries* case,³²⁹ before the Supreme Court of Canada, four of six judges held the general and prospective declaration in the Railway Act invalid, but two of the judges, Mignault and Newcombe JJ. disagreed, and the Privy Council, finding it unnecessary to deal with the point, decided to leave it "absolutely open".

The *Luscar Collieries* case, it should be noted, dealt with a declaration that was both general and prospective. There should be no objection to a declaration that is general, so long as it is clear. And so far as prospective application is concerned, it should be noted as Newcombe J. pointed out in the *Luscar Collieries* case that section 92(10)(c) gives some indication that a declaration may be given prospective operation, for it speaks of "Such Works as . . . are *before* or after their Execution . . . declared . . .", etc. In the *Bell Telephone* case³³⁰ a declaration was held valid in respect of a work that was uncompleted. Prospective operation may possibly have been recognized by some of the judges of the Supreme Court

320. (1905), 36 S.C.R. 596.

321. (1921), 62 S.C.R. 92.

322. [1929] S.C.R. 200.

323. *St. John & Quebec Ry. Co. v. Jones* (1921), 62 S.C.R. 92, at p. 100.

324. For a discussion, see Lajoie, *Le Pouvoir Déclaratoire du Parlement* (Montreal, 1969), c. 2.

325. R.S.C., 1970, c. R-2, s. 6(1)(c).

326. R.S.C., 1970, c. G-16, s. 174.

327. R.S.C., 1970, c. A-19, s. 17.

328. The Supreme Court has recently upheld the validity of general and prospective declarations in *Jorgenson v. Attorney-General of Canada*, [1971] S.C.R. 724.

329. [1925] S.C.R. 460.

330. *Toronto Corporation v. Bell Telephone Co. of Canada*, [1905] A.C. 52.

of Canada in *Quebec Ry. Light & Power Co. v. Beauport*³³¹ in 1945. There Parliament declared the "undertakings of the appellant company" to be works for the general advantage of Canada. Some time before 1939 the company began to operate buses in addition to its railway. A 1939 Act purported to give the company power over the buses and Rinfret C. J. relied on this latter Act. But Kerwin and Rand JJ., and Davis J. in a dissenting judgment, seem to have thought the Act originally making the work subject to the declaration was sufficient to cover the buses. Of course, the case may be simply explained by saying that once a work is subject to federal power, modifications to the work must be permitted. This is really all that Rand J. said, but in any event the case does add some weight to the view that a declaration may have prospective operation.

Turning to the matters that may form the subject of a declaration, it should be observed that, unlike paragraph (a), paragraph (c) of section 92(10) does not refer to undertakings; it is confined to works, which the *Montreal Street Railway*³³² case tells us refers to physical things. However, Parliament has on several occasions purported to declare undertakings to be for the general advantage and there is ground for the view that "works" in paragraph (c) includes undertakings, at least undertakings connected with works.³³³ In any event the courts have not confined the paragraph to items *ejusdem generis* with paragraph (a),³³⁴ and in addition to railways,³³⁵ railway bridges³³⁶ and such means of communication, declarations respecting grain elevators and feed mills,³³⁷ atomic energy³³⁸ and munition factories³³⁹ have either been upheld or considered valid in *dicta*. It is likely, therefore, that almost any physical structure on a provincial river, lake or other waters could be made subject to a declaration, but not the waters themselves. Such works must, however, be wholly situate within a province.³⁴⁰

One further matter must be mentioned in relation to works subject to a declaration under section 92(10)(c). Only the items falling squarely within the declaration come within it. Thus where British Columbia had granted land as a subsidy to the Esquimalt and Nanaimo Ry. Co., wholly situate within British Columbia but declared to be a work for the general advantage, the province could retake or otherwise legislate respecting these lands so long as they did not form part of the company's railway or were not so closely interconnected as to directly affect its railway operations.³⁴¹

331. [1945] S.C.R. 16; see also *Quebec Ry., Light & Power Co. v. Montcalm Land Co.*, [1927] S.C.R. 545.

332. *Montreal v. Montreal Street Railway*, [1912] A.C. 334.

333. See Lajoie, *Le Pouvoir Déclaratoire du Parlement* (Montreal, 1969), pp. 58-61.

334. *Reg. v. Thumliert* (1960), 20 D.L.R. (2d) 335.

335. See, *inter alia*, *Bourgoin v. La Compagnie du Chemin de fer de Montréal, Ottawa et Occident* (1879-80), 5 A.C. 381.

336. *Attorney-General of New Brunswick v. Canadian Pacific Ry.*, [1925] 2 D.L.R. 732.

337. *Reg. v. Thumliert* (1960), 20 D.L.R. (2d) 335; see also *R. v. Eastern Terminal Elevator*, [1925] S.C.R. 434, at pp. 443, 447.

338. *Re Perini Ltd. v. Can-Met Explorations* (1959), 15 D.L.R. (2d) 375; see also *Bachmeir Diamond v. Beaverlodge* (1962), 35 D.L.R. (2d) 241.

339. *Luscar Collieries v. McDonald*, [1925] S.C.R. 460, at p. 488.

340. *Kerley v. London & Lake Erie Ry. & Transportation Co.* (1913), 13 D.L.R. 365.

341. *McGregor v. Esquimalt and Nanaimo Ry.*, [1907] A.C. 462; *Wilson v. Esquimalt and Nanaimo Ry.*, [1922] A.C. 202.

Extent of Federal Power

Once an item falls within section 92(10), (a), (b), or (c), it comes within the operation of section 91(29), and accordingly the Dominion has exclusive legislative power over it. This includes authority to prescribe regulations for the construction, repair and alteration of such works, for their management, and for their constitution and powers.³⁴² It also includes the regulation of labour relations in connection with a work.³⁴³ In regulating respecting the work the Dominion may affect civil rights or other matters that would ordinarily fall within the provincial sphere. Thus Parliament may permit extraprovincial telephone or power companies to enter and erect poles with wires on the streets and highways of a municipality, without its consent,³⁴⁴ enact legislation prohibiting federal railway companies from "contracting out" of liability to pay personal injuries to their servants,³⁴⁵ regulate the manner in which roads and highways, provincial railway lines, telegraph and power lines, pipe lines and canals and the like shall cross federal railways, and apportion the expenses relating thereto among the federal railway and other parties concerned,³⁴⁶ and regulate the conditions of labour on such works. It is, however, strictly limited to legislation respecting the work and to matters incidental thereto. Thus while it may regulate street crossings on federal railways for the safety and convenience of the public, it cannot extend this jurisdiction so as to permit regulations, however closely related thereto, that are really aimed at the improvement of the streets.³⁴⁷

Whatever doubts there may be about other powers, it is clear that the Dominion may, under the combined operation of sections 91(29) and 92(10), authorize the expropriation of land, including land owned by the province, even without compensation, for federal railway purposes.³⁴⁸ The same has been held to apply to interprovincial canals,³⁴⁹ and there is no reason to believe it would not apply to any work or undertaking coming under this head. Accordingly expropriation could be justified for any work or undertaking relating to water resources that falls under the combined operation of sections 91(29) and 92(10). In doing so the legislation may provide that the acquisition shall be conditional, such as for example the authorization under section 198 of the Railway Act excepting mines and minerals unless expressly purchased; and in doing this the Dominion may make reasonable provisions to give effect to such a provision, such as by providing that mines and minerals are excepted from conveyances to federal

342. *Canadian Pacific Railway v. Corporation of the Parish of Bonsecours*, [1899] A.C. 367.

343. *Commission du Salaire Minimum v. Bell Telephone Co. of Canada*, [1966] S.C.R. 767.

344. *Toronto Corporation v. Bell Telephone Co. of Canada*, [1905] A.C. 52; *Toronto and Niagara Power Co. v. North Toronto Corporation*, [1912] A.C. 834.

345. *Grand Trunk Ry. v. Attorney-General of Canada*, [1907] A.C. 65.

346. *Toronto Corporation v. Canadian Pacific Ry.*, [1908] A.C. 55; *Attorney-General of Alberta v. Attorney-General of Canada*, [1915] A.C. 365; *Toronto Ry. Co. v. Toronto City*, [1920] A.C. 426; *Canadian Electrical Association v. Canadian National Ry.*, [1934] A.C. 551.

347. *British Columbia Electric Ry. v. Vancouver, Victoria and Eastern Ry. and Navigation Co.*, [1914] A.C. 1067; see *Toronto Ry. Co. v. Toronto City*, [1920] A.C. 426.

348. *McArthur v. Northern Pacific Jct. Ry.* (1890), 17 O.A.R. 86; *Attorney-General of British Columbia v. Canadian Pacific Ry.*, [1906] A.C. 204; *Re Location Plans* (1913), 5 W.W.R. 413; *Boland v. Canadian National Rys.*, [1925] 2 D.L.R. 1067; *Attorney-General of Quebec v. Nipissing Central Ry.*, [1926] A.C. 715; *Attorney-General of Canada v. C.P.R. and C.N.R.*, [1958] S.C.R. 285.

349. *Lazare v. St. Lawrence Seaway Authority*, [1957] Que. S.C. 5; see also *Reference re Waters and Water-Powers*, [1929] S.C.R. 200.

railways or pipe line companies, notwithstanding that a provincial statute provides that a conveyance carries the mines and minerals unless excepted.³⁵⁰ It can also impose a limitation period against persons claiming compensation from an expropriating authority, such as a railway company or pipe line company.³⁵¹ It has even been held that it may give power to a railway or other organization under the exceptions to section 92(10) to expropriate one person's land and give it to another to reduce the compensation it might otherwise have to pay. This occurred in *Boland v. C.N.R.*³⁵² where Orde J. A. of the Supreme Court of Ontario held that one person's land could be taken by a railway to give another person whose land had been appropriated a right of access.

Application of Provincial Legislation

Turning now to provincial legislation, it is clear that the province cannot legislate respecting works or undertakings falling within the exceptions in section 92(10) *qua* works and undertakings but provincial laws relating to property and civil rights may apply to federal undertakings. The line is impossible to draw in the abstract, and two early cases before the Privy Council, *Canadian Pacific Railway v. Bonsecours*,³⁵³ and *Madden v. Nelson and Fort Sheppard Railway*,³⁵⁴ are usually cited to elucidate the statement. In the first case, the Privy Council held applicable to the C.P.R. provincial legislation prescribing the cleaning of ditches and the removal of obstructions causing the inundation of neighbouring lands, but the Board pointed out that any attempt by a province to regulate the structure of a ditch forming part of the railway's authorized works would be *ultra vires*. Consistently with the latter statement a provincial enactment providing that a Dominion railway company was responsible for cattle injured or killed unless proper fences were built was held *ultra vires* in the *Madden* case.

Some further examples of provincial legislation of general application that have been held to apply to federal works and undertakings under sections 91(29) and 92(10) may be mentioned. An Ontario Act requiring licences and licence plates on vehicles on public highways has been upheld in relation to extraprovincial undertakings.³⁵⁵ So too, a general direct tax applies to a federal work or undertaking.³⁵⁶ Provincial legislation may affect federal works in other ways. An Expropriation Act may be used to take land for a highway to connect with an international bridge.³⁵⁷ A province can also assist a federal undertaking by making provisions for subsidizing it.³⁵⁸

There are occasions when an Act directly aimed at a federal undertaking may be valid. Thus in *Van Buren Bridge Co. v. Madawaska*³⁵⁹ a special Act to authorize a particular municipality to levy a direct tax against the company which had formerly been exempt from the ordinary municipal levies was upheld.

350. *Attorney-General of Canada v. C.P.R. and C.N.R.*, [1958] S.C.R. 285.

351. *McArthur v. Northern Pacific Jct. Ry.* (1890), 17 O.A.R. 86.

352. [1925] 2 D.L.R. 1067.

353. [1899] A.C. 367.

354. [1899] A.C. 626; see also *Grand Trunk Ry. v. Therrien* (1900), 30 S.C.R. 485.

355. *Reg. v. Arrow Transit Lines*, [1955] 2 D.L.R. 351.

356. *Canadian Pacific Ry. v. Bonsecours*, [1899] A.C. 367.

357. *Bawtinheimer v. Niagara Falls Bridge*, [1950] 1 D.L.R. 33.

358. *Dow v. Black* (1874-5), 6 A.C. 272; *cf.*, *Ex Parte Marks* (1872), Stevens N.B. Dig. 137.

359. (1959), 15 D.L.R. (2d) 375.

In the *Madawaska* case and the other cases mentioned there was nothing in the legislation that would constitute a substantial impairment of the capacity of the federal undertaking. It is clear that any legislation that has the effect of impairing or destroying the capacity of a federal undertaking will be held *ultra vires*, if specific, and inapplicable to the undertaking where the Act is general. This is clearly brought out in *Bourgoin v. La Compagnie du Chemin de Fer de Montréal, Ottawa et Occident*.³⁶⁰ There a railway company originally incorporated by Quebec was declared to be a work for the general advantage under section 92(10)(c). Subsequently the company purported to convey all its holdings to the Quebec Government and agreed to dissolve itself. The conveyance was confirmed by a Quebec statute, which also purported to combine the company's operation with another company and dissolve the company. The Privy Council held both conveyance and statute void as obvious interferences with federal legislative powers. So too, in the *Bank Taxation* case,³⁶¹ the Board made it clear that a tax against a federal undertaking which would, in effect, destroy it would be *ultra vires*.

These Acts were specifically aimed at federal undertakings and so were held void, but general Acts may be held valid, but inapplicable to federal undertakings if they could effect the practical destruction or piecemeal dismemberment of a federal undertaking. Thus provincial Mechanics Lien Acts have been held inapplicable to undertakings extending beyond a province, such as interprovincial pipelines³⁶² and railways,³⁶³ because to enforce the liens by sale would effect their piecemeal dismemberment. In *Re Perini Ltd. v. Can-Met Explorations*,³⁶⁴ however, Landreville J. of the Ontario High Court took a different view of an undertaking falling under federal jurisdiction by virtue of a declaration under section 92(10)(c), a provincially incorporated mining company falling within the declaration in the Atomic Energy Act. Since the company was wholly intraprovincial, sale pursuant to the Mechanics Lien Act could be effected as a whole unlike an extraprovincial undertaking. Accordingly the Act did not impair in a substantial degree or effect a piecemeal dismemberment of this federal undertaking and so applied to it. In that case, however, Landreville J. found that certain provisions of the Atomic Energy Act contemplated the application of provincial Mechanics Lien legislation. In *Larsen v. Nelson & Fort Sheppard Railway*³⁶⁵ on the other hand, which also concerned a work subject to a declaration under section 92(10)(c), the court found the provisions of the British Columbia Mechanics Lien Act contrary to those of the Dominion Railway Act and, therefore, held the Mechanics Lien Act inapplicable.

There are areas where federal and provincial legislation may overlap. In such cases if the field is clear, then either federal or provincial legislation will be valid, but if the field is occupied by both federal and provincial legislation, the federal

360. (1880), 5 A.C. 381.

361. *Attorney-General of Alberta v. Attorney-General of Canada*, [1939] A.C. 117.

362. *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd. and Trans-Mountain Oil Pipe Line Co.*, [1954] S.C.R. 207; *Cant v. Canadian Bechtel Ltd.* (1958), 12 D.L.R. (2d) 215.

363. *Crawford v. Tilden* (1907), 14 O.L.R. 572; *Johnson & Carey Co. v. Canadian Northern Ry.* (1918), 44 O.L.R. 533.

364. (1950), 15 D.L.R. (2d) 375.

365. (1895), 4 B.C.R. 151.

legislation will prevail.³⁶⁶ Thus in the *St. Francois* case,³⁶⁷ a federal water power company was held not to be prevented from operating in a portion of the province even though a provincial Act required that permission be obtained to do so from a provincial company, and such permission had not been obtained. Again, provincial workmen's compensation Acts have been held to apply to employers and employees on federal undertakings.³⁶⁸

It is, at times, difficult to say whether legislation is essentially concerned with an undertaking or involves a matter over which federal and provincial legislation overlap. Thus conditions of labour—including labour relations, hours of work, rates of wages, etc.—over which the provinces generally have jurisdiction³⁶⁹ as matters of property and civil rights were once considered to fall within the overlapping field in relation to matters falling within the exceptions to section 92 (10).³⁷⁰ But in the recent case of *Commission du Salaire Minimum v. Bell Telephone Co.*³⁷¹ the Supreme Court of Canada held that these matters were a vital part of the management of commercial operations and accordingly fell to be regulated solely by the federal Parliament. The workmen's compensation cases were distinguished by looking upon compensation as a statutory right which did not purport to regulate the contract of employment, even though in earlier cases such compensation had been looked upon as a statutory term of the contract.³⁷² In the light of this, the recent decision³⁷³ holding that the Ontario Construction Safety Act applied to work on the Ontario side of an interprovincial bridge over the Ottawa River may be difficult to justify unless the bridge is held not to connect the provinces.

Even when an activity falls within the exclusive federal sphere, however, the Dominion may provide that provincial laws shall apply to that activity.³⁷⁴ This device is most useful in defining the provincial laws directly dealing with a work that is subject to a declaration.³⁷⁵

In addition the Dominion, though it cannot delegate its legislative authority to the provinces,³⁷⁶ may and has in relation to extraprovincial motor transport delegated to provincially established boards power to licence and regulate them.³⁷⁷ This may, as it has done in that situation, raise difficulty over which province has

366. See, *inter alia*, *Montreal v. Montreal Street Railway*, [1912] A.C. 334; *Reference re Waters and Water-Powers*, [1929] S.C.R. 200.

367. *La Compagnie Hydraulique de St. François v. Continental Heat and Light Co.*, [1909] A.C. 194.

368. *The Canada Southern Ry. Co. v. Jackson* (1890), 17 S.C.R. 316; *Workmen's Compensation Board v. Canadian Pacific Ry.*, [1920] A.C. 184; *Sincennes-McNaughton Lines Ltd. v. Bruneau*, [1924] S.C.R. 168; *Bonavista Cold Storage Co. v. Walters* (1960), 20 D.L.R. (2d) 744.

369. *In the Matter of Legislative Jurisdiction over Hours of Labour*, [1925] S.C.R. 505.

370. *Ibid.*; see also *Workmen's Compensation Board v. Canadian Pacific Ry.*, [1920] A.C. 184.

371. [1966] S.C.R. 767.

372. See *Workmen's Compensation Board v. Canadian Pacific Ry.*, [1920] A.C. 184; *Sincennes-McNaughton Lines Ltd. v. Bruneau*, [1924] S.C.R. 168.

373. *Reg. v. Beaver Foundations Ltd.* (1968), 69 D.L.R. (2d) 649.

374. *Corporation of St. Joseph v. Quebec Central Ry.* (1885), 11 Q.L.R. 193; 14 R.L.O.S. 54; 8 L.N. 82.

375. For a discussion of this question as well as other problems respecting federal and provincial laws subject to a declaration under section 92(10)(c), see Lajoie, *Le Pouvoir Déclaratoire du Parlement* (Montreal, 1969), c. 4.

376. *Attorney-General of Nova Scotia v. Attorney-General of Canada*, [1951] S.C.R. 31.

377. See *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569.

licensing power under certain circumstances,³⁷⁸ but there seems no constitutional impediment for the Dominion Parliament to make a selection to avoid difficulty.

Treaty Power

Negotiation and Execution

To understand the treaty power under Canadian constitutional law it is imperative to remember that it has an executive and a legislative aspect.

Looking first at the executive side, under English law the management of external relations, including the power to make treaties, is vested in the Crown.³⁷⁹ In England this treaty power is exercised on the advice of the British Cabinet or the appropriate Minister thereof. By section 8 of the British North America Act, executive power and authority over Canada continues to be vested in the Queen, and at Confederation executive power over external affairs was exercised on the advice of the British Cabinet. Canada was not then a sovereign state but was merely a part of the Empire.

With the development of Canada to full sovereign status, culminating in the Imperial Conference of 1927 and the Statute of Westminster, 1931, the British government gradually abandoned its role of carrying on Canada's external relations, and beginning with the Halibut Treaty in 1921, treaties were negotiated and signed by Canadian plenipotentiaries acting under instructions of the Canadian government.³⁸⁰

Duff C. J. in his dissenting opinion in the *Labour Conventions*³⁸¹ case was of the view that the effect of this constitutional development was to vest the executive control over Canada's external relations in the federal government. In affirming the majority opinion of the Supreme Court of Canada in that case, the Privy Council expressed no opinion on the question, but the federal government continued to act on the basis that it is the sole adviser to the sovereign in matters of external relations affecting Canada—in practical terms that it is responsible for Canada's external relations, including the negotiation of treaties.³⁸² This view was recently given support in the reference *Re: Offshore Mineral Rights of British Columbia*.³⁸³ Though Quebec spokesmen and writers have questioned this in relation to matters within provincial legislative competence in recent years,³⁸⁴ the making of such treaties is governed by convention (i.e., accepted constitutional practice) and treaties entered into in this manner cannot be judicially questioned. In fact, since 1947 the Letters Patent Constituting the Office of Governor General

378. See *Re Tank Truck Transport Ltd.* (1961), 25 D.L.R. (2d) 161; affirmed: [1963] 1 O.R. 272; *R. v. Cooksville Magistrate's Court, Ex Parte Liquid Cargo* (1965), 46 D.L.R. (2d) 700; *Re Kleyser's Cartage Co. and Motor Carrier Board* (1965), 48 D.L.R. (2d) 716; *Reg. v. Ontario Highway, Ex Parte Coughlin* (1966), 53 D.L.R. (2d) 30; *Reg. v. Constable Transport Ltd.* (1967), 60 D.L.R. (2d) 577; *Reg. v. Beaney* (1967), 62 D.L.R. (2d) 20.

379. See, *inter alia*, *In re Employment of Aliens* (1922), 63 S.C.R. 293, at pp. 328-9, *per* Duff J.; *Attorney-General of Canada v. Attorney-General of Ontario*, [1937] A.C. 326, at p. 347.

380. Reference *re the Weekly Rest in Industrial Undertakings Act, The Minimum Wages Act, and The Limitation of Hours of Work Act*, [1936] S.C.R. 461.

381. *Ibid.*

382. *Attorney-General of Canada v. Attorney-General of Ontario*, [1937] A.C. 326, at p. 349.

383. [1967] S.C.R. 792.

384. It is beyond the scope of this work to review the extensive literature on the subject in recent years. For recent reviews, see Gerald Morris, "The Treaty Making Power: A Canadian Dilemma" (1967), 45 Can. Bar Rev. 478; Gotlieb, *Canadian Treaty-Making* (Toronto, 1968).

transfer to the Governor in Council (in substance the federal Cabinet) all powers and authorities lawfully belonging to the Sovereign (Article II), and there is express power (Article IV) given the Governor General to appoint diplomatic and consular officers and to issue exequators to foreign consular officers.³⁸⁵ The effect of this appears to formalize the transfer of control of foreign relations, including power to make treaties with other countries, to the federal government.

Implementation

i General

A treaty properly entered into by the executive is, under international law, applicable to Canada so far as other party states to the treaty are concerned. Sometimes a treaty may be performed by Canada under existing executive or legislative power. But, with a few exceptions, if a treaty involves a change in the law of the land or affects the rights of a subject, legislation is required to implement it.³⁸⁶ For example, in *Arrow River and Tributaries Slide & Boom Co. v. Pigeon Timber Co.*,³⁸⁷ a company was authorized under provincial statute to improve the floatability of a river and charge tolls for use of the improvements. This, it was argued, violated the Ashburton-Webster Treaty between Great Britain and the United States which provided that the river should be "free and open" to the subjects of both countries. While the major ground of decision was that the treaty was not violated, Lamont J. pointed out that even if the Act was in contravention of the treaty, this made no difference since it was not implemented by legislation.³⁸⁸ Similarly, even if a treaty provides for certain rights to be given to an individual, legislation is required to implement it and legislation can take away such rights even when there is a treaty.³⁸⁹

ii Empire Treaties

At Confederation the British government, as already mentioned, managed the foreign affairs of all parts of the Empire, including Canada. Accordingly the only type of treaty dealt with in the British North America Act, 1867, are Empire treaties; it was not contemplated that Canada should enter its own treaties. Section 132 of the British North America Act, therefore, provides:

132. The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.

385. See R.S.C., 1970, Appendices, p. 445, at p. 446.

386. See, *inter alia*, *In re Employment of Aliens* (1922), 63 S.C.R. 293, at pp. 328-9; *Attorney-General of Canada v. Attorney-General of Ontario*, [1937] A.C. 326, at p. 347; *Albany Packing Co. Inc. v. Registrar of Trade Marks*, [1940] Ex. C.R. 256, at pp. 265-6; *Francis v. The Queen*, [1956] 3 D.L.R. 641.

387. [1932] S.C.R. 495; similar views had been expressed in the courts below: (1930), 65 O.L.R. 575; (1931), 66 O.L.R. 577.

388. While there is a statement in *In re the Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54, at p. 74 that indicates that when a subject matter falls within an Empire treaty, it falls exclusively within federal competence, the point here is not affected.

389. See *Smith v. Ontario and Minnesota Power Co.* (1918), 45 D.L.R. 266, at p. 270.

This places exclusive power to implement Empire treaties in the federal government and Parliament, whether or not the subject matter of the treaty would ordinarily fall within the legislative competence of the provinces.³⁹⁰ And if there is any conflict between such federal legislation and provincial legislation, the federal legislation overrides.³⁹¹ It may even be that provincial legislation falling within the area covered by an Empire Treaty is *ultra vires*. There is a *dictum* in the Privy Council decision in the *Aeronautics Reference*³⁹² that supports this approach. However, a different attitude was later expressed by Lamont J. in the Supreme Court of Canada in *Arrow River Slide & Boom Co. v. Pigeon Timber Co.*³⁹³

Implementing legislation under section 132 need not come within the exact terms of the treaty; it is sufficient that it is reasonably necessary to perform the obligations under it. For example, in the Migratory Birds Convention, Great Britain and the United States agreed on a number of provisions for the conservation of migratory birds. In the implementing statute the Dominion prohibited, *inter alia*, possession, purchase and sale of dead migratory birds though this was not expressly provided for in the treaty. This legislation was held valid by the Manitoba Court of Appeal in *R. v. Stuart*³⁹⁴ as being reasonably ancillary to the purpose of the treaty. It is clear, too, that such legislation may be amended at any time, so long as it falls within the ambit of the treaty.³⁹⁵ It also is possible that the implementation of a minor amendment to an Empire treaty made by a treaty of the Canadian government might be held to fall within section 132, but a significant or severable modification would probably not be. Finally when the treaty ends, Dominion power also ends unless, of course, justification can be found under another head of federal power.³⁹⁶

Empire treaties are of great importance in relation to water resources. Many treaties affecting boundary and transboundary waters pre-date the full development of Canada as a sovereign state; indeed many pre-date Confederation. They are Empire Treaties, and unless their subject matter otherwise falls within Dominion jurisdiction, Dominion jurisdiction is dependent on their continued existence. Of course the subject matter of these treaties may fall within Dominion competence under other heads (notably the "Peace, Order and Good Government" clause),³⁹⁷ but section 132 removes all doubt. Among the more important treaties are the Ashburton-Webster Treaty, and the Boundary Waters Treaty.

It might be added in relation to pre-Confederation statutes that the mere fact that a power was retained for a province under a treaty in no way prevented the Imperial government from transferring that power to the federal government. Thus in the Ashburton-Webster Treaty Great Britain retained the right of New Brunswick to regulate navigation on the Saint John River where both banks were in

390. *Attorney-General of British Columbia v. Attorney-General of Canada*, [1924] A.C. 203; *R. v. Stuart*, [1925] 1 D.L.R. 12; *In re The Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54.

391. *Ibid.*

392. [1932] A.C. 54, at p. 74.

393. [1932] S.C.R. 495.

394. [1925] 1 D.L.R. 12.

395. *Reg. v. Sikyea* (1964), 43 D.L.R. 150, at p. 161.

396. See *Johannesson v. Rural Municipality of West St. Paul*, [1952] 1 S.C.R. 292.

397. See pp. 7-8.

New Brunswick, but the Privy Council held this power had been transferred to the Dominion under section 91(10) of the British North America Act, and the bridge in question in the case also came within federal jurisdiction by the combined effect of sections 91(29) and 92(10).³⁹⁸ The Board found it unnecessary under these circumstances to discuss section 132.

iii *Canadian Treaties*

Although existing Empire treaties are still of great importance in relation to Canadian water law, such treaties are no longer negotiated. Canada negotiates its own treaties, and it is in the context of the powers of implementing such treaties that future international agreements relating to water must take place.

It might at one time have been possible to interpret section 132 to cover treaties negotiated by Canada, but the courts soon disposed of this possibility.³⁹⁹ It might also have been possible to hold that the implementation of treaties did not fall within provincial powers at all, but came within the Dominion power to legislate respecting the "Peace, Order and Good Government of Canada", and there was for a time some indication by the Privy Council that this might well be the case.⁴⁰⁰ However, in the *Labour Conventions* case⁴⁰¹ the Privy Council made it clear that there was no legislative power over treaties as such; if the subject matter of a Canadian treaty (as opposed to an Empire treaty) fell within a matter coming within the competence of a province, federal legislation to implement it was invalid: a provincial statute was necessary. Only if the subject matter fell within a federal power could the Dominion implement the treaty. Though there are remarks in *Francis v. The Queen*⁴⁰² and in the reference *Re: Offshore Mineral Rights of British Columbia*⁴⁰³ that may be looked upon as weakening the decision, it seems unlikely that the *Labour Conventions* case would be completely overruled.

There are, however, a number of qualifications to the rule established in the *Labour Conventions* case. It has been mentioned that there are some types of treaties that do not require legislative implementation. Such are treaties of peace and transfers of property, and other matters affecting sovereignty. Rand J., Cartwright J. concurring, thus put it in *Francis v. The Queen*⁴⁰⁴ in the Supreme Court of Canada:

A treaty is primarily an executive act establishing relationships between what are recognized as two or more independent states acting in sovereign capacities; but... its implementation may call for both legislative and judicial action. Speaking generally, provisions that give recognition to incidents of sovereignty or deal with matters in exclusively sovereign aspects, do not require legislative confirmation: for example, the recognition of independence, the establishments of boundaries and, in a treaty of peace, the transfer of sovereignty over property, are deemed executed and the treaty becomes the muniment or evidence of the political or proprietary title.

398. *Attorney-General of New Brunswick v. Canadian Pacific Railway*, [1925] 2 D.L.R. 732.

399. See *In re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304.

400. See *ibid.*

401. *Attorney-General of Canada v. Attorney-General of Ontario*, [1937] A.C. 326.

402. [1956] S.C.R. 618, *per* Kerwin C. J.; see also the extrajudicial remarks of Lord Wright in (1947), 33 Can. Bar Rev., at pp. 1126-8.

403. [1967] S.C.R. 792.

404. [1956] S.C.R. 618, at p. 625; see also *Ritchie v. R.*, [1943] 3 D.L.R. 540, at p. 545.

The establishment of boundaries, it will be noted is mentioned, and such boundaries may be water boundaries. A substantial number of Canada's water boundaries with the United States have never been confirmed by statutes, and there are cases where these boundaries have been recognized to be the boundaries of Canada and of the province.⁴⁰⁵ There is, in fact, authority that an executive declaration of the place where inland waters begin will be binding on the courts.⁴⁰⁶ Since executive authority over Canada's foreign affairs is vested in the Queen and delegated to the Governor in Council, it follows that the federal government may by such executive acts and treaties affect provincial boundaries. It is also reasonable to believe that surrenders of quasi-proprietary rights, such as the right to freedom of navigation that exists in many American-Canadian treaties respecting boundary waters, may be of the same character.

Such treaties and other executive acts requiring no legislative implementation may incidentally affect the rights of the subject. For example, the title of a person who held a piece of land, or a water lot, declared no longer to be within the realm would seriously be affected. But it should be noted that treaties that take effect without legislative confirmation are limited to those dealing with incidents of sovereignty. Thus provisions, even in a treaty of peace, dealing with the rights of individuals would require legislation to incorporate them into municipal law.⁴⁰⁷

Another possible qualification to the doctrine in the *Labour Conventions* case relates to multilateral treaties establishing general rules of customary law that become part of the customary law of nations, such as for example some of the provisions of the Convention on the Territorial Sea and the Contiguous Zone.⁴⁰⁸ Many rules of customary international law are incorporated into the law of the land by judicial decision, and there is authority for the view that the provinces may not legislate in violation of customary international law.⁴⁰⁹ However, the cases in which this proposition arose were closely connected with international sovereignty. This limitation on provincial power does not necessarily extend federal legislative competence, but by exercising its executive power over external affairs, the federal government may, by treaty or otherwise, contribute to the shaping of customary international law.

But these qualifications apart, legislation to implement international treaties requiring an alteration of the law of the land must follow the ordinary division of legislative power between the federal and provincial legislatures. It follows that the implementation of many treaties respecting water will require federal-provincial co-operation.

405. *The Grace* (1894), 4 Ex. C.R. 283; *R. v. Meikleham* (1905), 11 O.L.R. 366.

406. *The Fagernes*, [1927] P. 311; see also respecting territorial waters *Reg. v. Kent Justices, Ex Parte Lye*, [1967] 2 W.L.R. 765; *Post Office v. Estuary Radio Ltd.*, [1967] 1 W.L.R. 1396; the two latter cases may, however, not be consistent with the *Offshore Reference*, [1967] S.C.R. 792.

407. *Francis v. The Queen*, [1956] 3 D.L.R. 641, per Kerwin C. J. (Taschereau and Fauteux JJ. concurring); cf., *Secretary of State of Canada v. Custodian*, [1931] S.C.R. 170, per Duff and Newcombe JJ., at p. 198.

408. See (1965), 2 Can. Yearbook Int. Law, at pp. 325-6. *Re: Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792 asserted that the whole treaty applied to Canada before it was ratified by Canada, but the International Court of Justice in the *North Sea Continental Shelf Cases* (1969), I.C.J. Rep. 3, held that only certain parts of the convention reflected customary international law.

409. *Reference re Tax on Foreign Legations*, [1943] S.C.R. 208; *G. V. La Forest*, "May the Provinces Legislate in Violation of International Law?" (1961), 39 Can. Bar Rev. 78.

iv Provincial International Agreements

Though some scholars have argued against the position,⁴¹⁰ it follows from what has been said about federal executive powers that the provinces have no power to enter treaties as sovereign states. But there seems no constitutional impediment to prevent provinces or municipalities from entering into agreements with foreign states or entities thereof. These may not be made the subject of an international claim, but the provinces may, if they wish, provide for their enforcement by legislation. Provincial legislation to enforce in the province maintenance orders made in other states has been held valid by the Supreme Court of Canada, and it makes no difference that such legislation has been passed in accordance with an arrangement or understanding with other states.⁴¹¹ Such agreements have been entered into in relation to water resources. Thus in British Columbia there is a provincial agreement with Seattle, Washington, relating to damming and flooding a portion of the province on the Skagit River.⁴¹²

Provincial Lands

Section 109 of the British North America Act, 1867, retains for the Provinces of Nova Scotia and New Brunswick all lands, mines, minerals and royalties belonging to the provinces at Union that are situate in those provinces, and section 117, which amounts to the same thing, provides that "The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act." The terms of Union of Prince Edward Island apply these provisions to that province,⁴¹³ and Terms 35 and 37 of the Terms of Union of Newfoundland with Canada are of the same effect as sections 117 and 109, respectively.⁴¹⁴

Since the administration and control of provincial Crown property had been conveyed to these provinces before Confederation,⁴¹⁵ the effect of section 109 and 117 and Terms 35 and 37 was for practical purposes to give to the provinces the bulk of the public domain not previously granted⁴¹⁶ including the beds of rivers, even navigable rivers.⁴¹⁷ Provincial ownership also carries with it power to act in respect thereof in the same way as an ordinary landowner. A province can, for example, attach conditions to grants and licences even if these touch on subjects ordinarily falling within federal competence such as aliens⁴¹⁸ or trade and commerce.⁴¹⁹ For example, it has been held that a province may grant permits to cut provincial timber on condition that it shall not be exported in a raw state outside

410. For a review of the various views, see Morris, "The Treaty Making Power: A Canadian Dilemma" (1967), 45 Can. Bar Rev. 478; see also Gottleib, *Canadian Treaty-Making* (Toronto, 1968).

411. *In the Matter of the Reciprocal Enforcement of Maintenance Orders Act*, [1956] S.C.R. 137.

412. Order in council No. 1219, May 7, 1962 (B.C.); see Castel, *International Law Chiefly as Interpreted and Applied in Canada* (Toronto, 1965), p. 823.

413. Order in council of June 26, 1873 under the British North America Act, s. 146; see R.S.C., 1970, Appendices, p. 291.

414. British North America Act, 1949, 12 & 13 Geo. VI, c. 22, Sch. (Imp.).

415. (1837), 8 Wm. IV, c. 1 (N.B.); R.S.N.B., 1854, tit. 3, c. 5; (1849), 12 & 13 Vict., c. 1 (N.S.); (1844), 7 Vict., c. 1 s. 19 (Nfld.); R.S.N. 1872, tit. XIII, c. 45, s. 16; (1851), 13 Vict. c. 3 (P.E.I.).

416. *St. Catherine's Milling and Lumber Co. v. Reg.* (1888), 14 A.C. 46.

417. See *Attorney-General of Canada v. Attorney-General of Ontario*, [1898] A.C. 700; *Montreal v. Montreal Harbour Commissioners*, [1926] A.C. 299.

418. *Brooks-Bidlake and Whittall Ltd. v. Attorney-General of British Columbia*, [1923] A.C. 450.

419. *Smylie v. R.* (1900), 27 O.A.R. 172.

the province.⁴²⁰ The province could grant water rights on its lands subject to such conditions, for it is clear that water rights (such as riparian rights and rights relating to the ownership of the bed) like other ordinary incidents to land belong to the provinces by virtue of their retention of their "lands".⁴²¹ This can be seen from *Burrard Power Co. Ltd. v. R.*⁴²² concerning the transfer by British Columbia to the Dominion of the "public lands" in the Railway Belt of that province. Following the transfer water commissioners, purporting to act under a provincial statute, granted certain water rights in the belt to the appellant company. But the Privy Council upheld the Dominion contention that the transfer to it of the "public lands" carried with it the water rights incidental to those lands.

Another incident of land is the right of the owner of the bed of waters to fish thereon, and the province may legislate respecting provincially owned fisheries under its power under section 92(5) of the British North America Act to make laws relating to "The Management and Sale of Public Lands belonging to the Province." Of course the Dominion may also legislate respecting even provincially owned fisheries under its legislative power over Sea Coast and Inland Fisheries (section 91(12)), and as already seen, in case of conflict federal legislation will prevail. However, federal legislation cannot under the guise of regulating fisheries regulate property and civil rights; it cannot, for example, grant a private fishery to one person on another person's lands, let alone provincial lands, unless, probably, a strong case is established that this is necessary to a proper regulation of the fisheries.⁴²³ Federal regulation of fisheries must, therefore, ordinarily respect provincial rights. So that if, for example, a particular type of fishing, for example, oyster fishing, requires the use of the subsoil belonging to the province, provincial permission for its use must be obtained. Of course, the provinces can and sometimes do, transfer to the federal government power to grant oyster leases to provincially owned subsoil.⁴²⁴

There is, however, one type of fishing over which the province has no jurisdiction even where it owns the underlying lands. Under English law, the public has a right to fish in tidal waters, and this right is paramount to the owner's right of property. This public right is not a matter of property and accordingly only the federal Parliament has power to regulate it. This public right, however, is limited to ordinary fishing so that in the case of fishing by kiddles or weirs or other methods involving the use of the subsoil, the province, like any other landowner, may prohibit the use of its lands for this purpose without its permission.⁴²⁵

The question of jurisdiction of coastal waters depends in no small degree on the extent to which the provinces extend offshore. This question is discussed in Chapter Twenty-two.

420. *Ibid.*

421. *Attorney-General of British Columbia v. Attorney-General of Canada* (1889), 14 A.C. 295; *Burrard Power Co. Ltd. v. R.*, [1911] A.C. 87.

422. [1911] A.C. 87.

423. These matters are discussed in more detail at pp. 38-42.

424. See, for example, N.B. orders in council 31-305 of Aug. 5, 1931 and 32-30 of Feb. 8, 1932.

425. *Attorney-General of British Columbia v. Attorney-General of Canada*, [1914] A.C. 153; see also *Attorney-General of Canada v. Attorney-General of Quebec*, [1921] 1 A.C. 413.



PART II

The Administrative Framework

CHAPTER TWO

Federal Administrative Powers

By Alan D. Reid

GENERAL

Water resources have become the subject of considerable administrative control by departments and agencies of government at the federal, provincial and municipal levels. This control may embrace, among other possibilities, a power to limit the use of water, a power to employ water resources for particular purposes (as, for example, for sewage services and water supply, power supply or for industrial development) or a power to spend money on research and development with a view to the more effective utilization of the resources.

The administration of water resources in the Atlantic Provinces has been the subject of a concurrent study¹, and therefore no attempt will be made to study actual administrative activities carried out by the various departments and agencies in the field. What will be outlined here are the statutory sources for the administrative powers exercisable by these bodies.

Various departments and agencies of the federal government exercise powers and responsibilities affecting the development and use of water. In some cases responsibilities are conferred by statute upon a particular minister or agency; in other cases responsibilities are conferred by a statute, but the person upon whom they are to fall is to be designated by order in council in accordance with the terms of the particular statute. Provision is also made for the transfer of powers, duties and functions from one minister to another or from one department to another by the Governor in Council². Accordingly, the administrative structure is in a state of flux, changes being made frequently where it appears expedient to transfer duties to or consolidate them in a particular department. In certain cases the conferring of responsibility by order in council is not published in Part II of the Canada Gazette, Statutory Orders and Regulations, making for some difficulty in ascertaining precisely where the authority lies.

DEPARTMENT OF ENERGY, MINES AND RESOURCES

The Department of Energy, Mines and Resources exercises a comprehensive control over water resources within the federal sphere under the direction of the Minister of Energy, Mines and Resources. The duties, powers and functions of the Minister extend to and include all matters over which the federal Parliament has

1. See Paul C. Leger, *The Administration of Water Resources in the Atlantic Provinces*, 1969.

2. Public Service Rearrangement and Transfer of Duties Act, R.S.C., 1970, c. P-34, s. 2.

jurisdiction (not by law assigned to any other department, branch or agency of the government of Canada) relating to energy, mines and minerals, water and other resources³.

The most significant legislation charged to the Minister is the Canada Water Act⁴, passed in response to increasing demands on the water resources of Canada and the increasing threat of water pollution to the health, well-being and prosperity of the people of Canada and to the quality of the Canadian environment. The Act sets the stage for administrative co-operation between the federal government and the provinces on water resource and water quality management, and provides a firm basis for federal initiative in the absence of such co-operation.

More specifically, the Minister is empowered, with the approval of the Governor in Council, to enter into arrangements with provincial governments to establish on a national, provincial, regional, lake or river-basin basis, inter-governmental committees or other bodies to consult on water resource matters and to advise on priorities for research, planning, conservation, development and utilization of water resources⁵, to advise on the formulation of water policies and programs⁶ and to facilitate their coordination and implementation⁷. In addition, when there is a significant national interest in the water resource management of any waters, the Minister may undertake directly, with regard to waters under federal jurisdiction, and undertake jointly with interested provincial governments with respect to inter-jurisdictional, international and boundary waters, to develop programs to provide inventories and data on quantity, quality and distribution⁸, to formulate comprehensive water resource management plans⁹, to design projects for conserving, developing and utilizing water¹⁰, and to implement them¹¹. Where agreement for a joint undertaking cannot be reached and there is a significant national interest the Minister is authorized, subject to approval of the Governor in Council¹², to undertake unilaterally the formulation of comprehensive water resource management plans and the planning of projects for conserving, developing and utilizing the water resources of interjurisdictional, international and boundary waters, and to undertake the implementation of such programs with respect to international and boundary waters¹³. Furthermore, the Minister is specifically authorized on his own initiative to conduct research, collect data and establish inventories respecting any aspect of water resource management, or provide for this on a co-operative basis with any government, institution or individual.¹⁴

3. Government Organization Act, 1966, (1966-7), 14 & 15 Eliz. II, c. 25, s. 29 (Can) [General power over water now resides with the Minister of the Environment; see Addendum, p. 483].

4. R.S.C., 1970, 1st Supp., c. 5, s. 2(1) [now administered by the Minister of the Environment; see Addendum, p. 483].

5. *Ibid.* s. 3(a).

6. *Ibid.*, s. 3(b).

7. *Ibid.*, s. 3(c).

8. *Ibid.*, ss. 4(a), (b).

9. *Ibid.*, s. 4(d).

10. *Ibid.*, s. 4(e).

11. *Ibid.*, s. 4(f). See also s. 7 which itemizes the detailed provisions required in such agreements.

12. *Ibid.*, ss. 5(1), (2). The approval may only be given where the Governor in Council is satisfied that all reasonable efforts have been made by the Minister to reach an agreement with the one or more provincial governments having an interest in the water resource management of the waters in question, and that those efforts have failed.

13. *Ibid.*, s. 5(1).

14. *Ibid.*, s. 6.

Perhaps the most immediately important aspect of the Canada Water Act is the provision it makes for establishing water quality management agencies. Where federal waters are concerned (those under the exclusive legislative jurisdiction of the Parliament of Canada),¹⁵ or where any waters are concerned the quality management of which has become a matter of urgent national concern, the Minister may enter into an agreement with an interested provincial government to designate the waters as a water quality management area, to provide for water quality management programs, and to authorize the Minister, jointly with one or more provincial governments, to create a new government agency, or use an existing one, as a water quality management agency to plan, initiate and carry out programs to restore, preserve and enhance the water quality level in that area¹⁶. This will entail significant research with a view to recommending a water quality management plan suggesting water quality standards, standards for waste deposit, treatment standards, effluent discharge fees, treatment and analysis charges, detailed estimates of implementation costs, and a date when the agency would become financially self-sustaining¹⁷. Where a recommended plan has been approved, the agency may, in order to implement the plan, design and operate waste treatment facilities, collect charges prescribed for waste treatment and analysis at such facilities, collect effluent discharge fees, monitor water quality levels, and inspect waste treatment facilities.

Where the Minister is unable to reach agreement with a provincial government or, although an agreement has been reached, an agency set up and a recommendation submitted, no agreement can be reached on the recommendation resulting in the termination of the agreement, provision is made for unilateral federal action even where the waters are interjurisdictional. If the quality management of these waters has become a matter of urgent national concern, the Governor in Council may, on the Minister's recommendation, designate the waters as a water quality management area and authorize the Minister to create a new federal agency or name an existing one to carry out the program of a water quality management agency¹⁸. Federal action may, of course, be taken on a unilateral basis with respect to federal waters in any event¹⁹, although, as already outlined, provision is made in the Act for joint action with respect to federal waters if this can be arranged²⁰.

Wide regulation-making power is conferred on the Governor in Council to control water quality management in water quality management areas. He may prescribe substances as waste²¹, prescribe procedures to be followed by agencies in determining their recommendations as to treatment charges²² and water quality standards²³, prescribe criteria for the determination by agencies of recommendations as to effluent discharge fees²⁴, require depositors of waste to keep records²⁵,

15. *Ibid.*, s. 2(1)(e).

16. *Ibid.*, ss. 9, 13(1). See also s. 10 which itemizes certain provisions to be specified in such agreements.

17. *Ibid.*, s. 13(1).

18. *Ibid.*, s. 11(1).

19. *Ibid.*, s. 11(2).

20. *Ibid.*, s. 9.

21. *Ibid.*, s. 16(1)(a).

22. *Ibid.*, s. 16(1)(b).

23. *Ibid.*, s. 16(1)(c).

24. *Ibid.*, s. 16(1)(d).

25. *Ibid.*, s. 16(1)(e).

make reports²⁶ and submit test portions to agencies²⁷, and establish methods for the analysis of test portions of waste²⁸. A further class of regulations may be made by the Governor in Council requiring, however, either the recommendation of a particular agency or the joint recommendation of the Minister and the affected provincial government.²⁹ These include regulations respecting the quantities of waste that may be lawfully deposited in the waters of a water quality management area and the conditions under which deposits may be made,³⁰ respecting charges for treatment and analysis of waste,³¹ respecting water quality standards for the area³² and respecting effluent discharge fees.³³

The Act creates two major prohibitions. The first is that no person shall deposit or permit the deposit of waste in waters comprising a water quality management area or in such a way as to affect such waters except in quantities and under conditions prescribed for that area.³⁴ "Waste", in addition to matters that may be prescribed by regulation,³⁵ means a substance that would degrade or alter or form part of a process of degradation or alteration of the quality of waters to an extent detrimental to their use by man or by any animal, fish or plant useful to man, and any water containing such a substance to an extent that those detrimental effects would be realized.³⁶ The second prohibition is that no person shall manufacture for use or sale in Canada or import into Canada any cleaning agent or water conditioner containing any nutrient (a substance promoting the growth of aquatic vegetation)³⁷ prescribed by regulation as a prescribed nutrient³⁸ in a concentration greater than a prescribed maximum concentration.³⁹ The maximum penalty for the violation of either prohibition is five thousand dollars for each day the violation continues.⁴⁰

Further provisions of the Act relate to the designation of inspectors and analysts⁴¹ and their respective authority,⁴² and the establishment of advisory committees to assist the Minister in carrying out the purposes and provisions of the Act.⁴³ The Minister is also authorized to publish and distribute information to enlighten the public on any aspect of the conservation or utilization⁴⁴ of the water resources of Canada, and is required to lay a report before Parliament annually on operations under the Act.⁴⁵

26. *Ibid.*, s. 16(1)(f).

27. *Ibid.*, s. 16(1)(g).

28. *Ibid.*, s. 16(1)(h).

29. *Ibid.*, s. 16(3).

30. *Ibid.*, s. 16(2)(a).

31. *Ibid.*, s. 16(2)(b).

32. *Ibid.*, s. 16(2)(c).

33. *Ibid.*, s. 16(2)(d).

34. *Ibid.*, s. 8.

35. *Ibid.*, s. 2(2).

36. *Ibid.*, s. 2(1)(k).

37. *Ibid.*, s. 17(b).

38. *Ibid.*, s. 19(a)(i).

39. *Ibid.*, s. 18. This is also to be set by regulation: see *ibid.*, ss. 19(a)(ii), (b).

40. *Ibid.*, s. 28.

41. *Ibid.*, s. 23.

42. *Ibid.*, s. 24.

43. *Ibid.*, s. 26.

44. *Ibid.*, s. 27.

45. *Ibid.*, s. 36.

In addition to the Canada Water Act, the Minister of Energy, Mines and Resources has authorities and duties under other federal legislation related to water resources. Under the Resources and Technical Surveys Act,⁴⁶ the Minister's responsibilities extend to the coordination, promotion and recommendation of national policies and programs respecting energy and water. He may conduct research, investigations and economic studies in relation to these resources, operate research institutes, laboratories, observatories and other facilities related to their use and development, and study recommendations with respect to the exploration, production, recovery, manufacture, processing, transmission, transportation, distribution, sale, purchase, exchange or disposition of such resources, or matters relating to their sources either within or outside Canada.⁴⁷ He may, further, formulate plans for the conservation, development and use of such resources and for research in this regard, and, with the authority of the Governor in Council and in co-operation with other departments, branches and agencies, implement these plans.⁴⁸ He is empowered to co-operate with the provinces and with municipalities,⁴⁹ and may consult with and establish conferences of representatives of producers, industry, universities, labor, and provincial and municipal authorities.⁵⁰

Another responsibility of the Minister is the administration of the International River Improvements Act⁵¹. This Act provides that the Governor in Council may make regulations respecting the construction and licensing of international river improvements,⁵² which are defined as dams, obstructions, canals, reservoirs or other works, the purpose or effect of which is to change the natural flow of, or interfere with the potential use outside Canada of water flowing from Canada to a place outside Canada.⁵³ The Act does not apply, however, to improvements constructed on rivers flowing into Canada,⁵⁴ to improvements constructed under Parliamentary authority⁵⁵ or to improvements situated within boundary waters under the 1909 treaty,⁵⁶ or constructed solely for domestic, sanitary, irrigation or other consumptive uses.⁵⁷ It is unlawful to construct, operate or maintain an international river improvement without a licence,⁵⁸ and operation in violation of the Act warrants forfeiture of the improvement to the Crown⁵⁹. The Minister is responsible for presenting to Parliament an annual report of the operations under the Act.⁶⁰ This Act is discussed in greater detail in Chapter Seventeen.

46. R.S.C., 1970, c. R-7. The responsibility was imposed by the Government Organization Act, 1966, (1966-7), 14 & 15 Eliz. II, c. 25, s. 41 (Can.) [Responsibility in relation to water now vests in the Minister of the Environment; see Addendum, p. 483].

47. R.S.C., 1970, c. R-7, s. 6.

48. *Ibid.*, s. 7(1).

49. *Ibid.*, s. 7(2).

50. *Ibid.*, s. 7(3).

51. R.S.C., 1970, c. I-22. The responsibility was imposed by the Government Organization Act, 1966, (1966-7), 14 & 15 Eliz. II, c. 25, s. 41 (Can.). [Responsibility now vests in the Minister of the Environment; see Addendum, p. 483].

52. R.S.C., 1970, c. I-22.

53. *Ibid.*, s. 2.

54. *Ibid.*

55. *Ibid.*, s. 7(a).

56. *Ibid.*, s. 7(b).

57. *Ibid.*, s. 7(c).

58. *Ibid.*, s. 4.

59. *Ibid.*, s. 6.

60. *Ibid.*, s. 10.

DEPARTMENT OF FISHERIES AND FORESTRY

The Department of Fisheries and Forestry is presided over by the Minister of Fisheries and Forestry,⁶¹ who is charged with the administration of several Acts, those of importance in this context being the Fisheries Act⁶² and the Fisheries Research Board Act.⁶³ Although the detailed matter of fisheries lies outside the scope of this work, certain administrative powers of the department relate to the use of water. The Minister has authority, for example, to require the owner of a dam, slide or other obstruction to install and maintain adequate apparatus and provide a sufficient flow of water in order to permit the safe passage of fish.⁶⁴ Other provisions allow the Governor in Council to prescribe what materials may not be placed in waters frequented by fish⁶⁵ and to make regulations respecting the obstruction and pollution of waters frequented by fish.⁶⁶ These provisions are discussed in greater detail in Chapter Eleven.

The Minister of Fisheries and Forestry is also charged with the control of the Fisheries Research Board of Canada, established under the Fisheries Research Board Act.⁶⁷ This Board consists of a chairman and not more than eighteen members, a majority of whom are to be scientists, with the remainder being representatives of the fishing industry and the Department of Fisheries and Forestry.⁶⁸ The Board has charge of all Dominion fishery research stations in Canada, and conducts and controls investigations of practical and economic problems relating to marine and fresh water fisheries, flora and fauna, and such other work as may be assigned to it by the Minister.⁶⁹

The Minister is further responsible for the administration of various other statutes that do not relate as much to water resources as to fishery resources.⁷⁰ These include the Coastal Fisheries Protection Act,⁷¹ the Fish Inspection Act,⁷² the Northwest Atlantic Fisheries Convention Act,⁷³ the Fisheries Prices Support Act,⁷⁴ and the Fisheries Development Act.⁷⁵

61. Government Organization Act, 1969, (1968-9), 17 & 18 Eliz. II, c. 28, s. 2 (Can.). [This Department is now abolished. The duties under it are vested in the Minister of Environment; see Addendum, pp. 483-4].

62. R.S.C., 1970, c. F-14.

63. R.S.C., 1970, c. F-24. The duty to administer this Act and the previously cited Act was imposed by the Government Organization Act, 1969, (1968-9), 17 & 18 Eliz. II, c. 28, s. 99 (Can.).

64. R.S.C., 1970, c. F-14, s. 20.

65. *Ibid.*, s. 30. See also R.S.C., 1970, 1st Supp., c. 17, s. 3.

66. *Ibid.*, s. 34. See also R.S.C., 1970, 1st Supp., c. 17, s. 4.

67. R.S.C., 1970, c. F-24. [Now under the administration of the Minister of the Environment; see Addendum, p. 483].

68. *Ibid.*, s. 4.

69. *Ibid.*, s. 6.

70. These duties were imposed by the Government Organization Act, 1969, (1968-9), 17 & 18 Eliz. II, c. 28, s. 99 (Can.). [Responsibility now vests in the Minister of the Environment, see Addendum, p. 483].

71. R.S.C., 1970, c. C-21.

72. R.S.C., 1970, c. F-12.

73. R.S.C., 1970, c. F-18.

74. R.S.C., 1970, c. F-23.

75. R.S.C., 1970, c. F-21.

DEPARTMENT OF REGIONAL ECONOMIC EXPANSION

This department is presided over by the Minister of Regional Economic Expansion,⁷⁶ whose general duties extend to matters relating to economic and social adjustment in areas requiring special measures to improve opportunities for productive employment and access to those opportunities.⁷⁷ In carrying out these duties he is to formulate plans for economic expansion and social adjustment, in co-operation with other departments, branches and agencies of the federal government⁷⁸ and with the provinces affected⁷⁹ and to provide for their implementation.⁸⁰ He may co-operate with a province in formulating a plan of economic expansion and social adjustment in an area within the province designated by the Governor in Council as a special area⁸¹ and enter into an agreement with the province for the joint implementation of the plan.⁸² Provision is made for federal grants and loans.

More specifically, the Minister is charged with responsibility for the administration of two statutes related to water resources in the Atlantic region. One is the Maritime Marshland Rehabilitation Act.⁸³ Under this Act the Minister may construct or assist in the construction of dykes, aboiteaux and breakwaters for the purpose of reclaiming and developing marshlands in the provinces of Nova Scotia, New Brunswick and Prince Edward Island,⁸⁴ and may establish advisory committees to make recommendations to him concerning undertakings pursuant to the Act.⁸⁵

Under the Atlantic Provinces Power Development Act,⁸⁶ the Minister of Regional Economic Expansion⁸⁷ may, with the approval of the Governor in Council, enter into agreements with any of the governments of New Brunswick, Nova Scotia, Prince Edward Island or Newfoundland to provide assistance to the province in the generation of electric energy by steam driven generators.⁸⁸ Such agreements must include provision for the construction, extension or completion of power projects in the provinces by the federal government and the payment therefor by the provinces.⁸⁹ A power project is defined as facilities for the generation of electric energy by steam driven generators, facilities for the control and transmission of electric energy, the site of these facilities, and land, water, water rights and installations used in connection with them.⁹⁰ The administration of any agreement may be committed to the Northern Canada Power Commission or the Dominion Coal Board as the Minister shall direct.⁹¹

76. Department of Regional Economic Expansion Act, R.S.C., 1970, c. R-4, s. 3(1).

77. *Ibid.*, s. 5(3).

78. *Ibid.*, s. 7(1)(a).

79. *Ibid.*, s. 7(2).

80. *Ibid.*, s. 7(1)(b).

81. *Ibid.*, s. 6.

82. *Ibid.*, s. 8.

83. R.S.C., 1970, c. M-4. The responsibility was imposed by the Government Organization Act, 1969, (1968-9), 17 & 18 Eliz. II, c. 28, s. 102 (Can.).

84. R.S.C., 1970, c. M-4.

85. *Ibid.*, ss. 8, 4(a).

86. R.S.C., 1970, c. A-17.

87. The responsibility was imposed by the Government Organization Act, 1969, (1968-9), 17 & 18 Eliz. II, c. 28, s. 102 (Can.).

88. R.S.C., 1970, c. A-17, s. 3(1).

89. *Ibid.*, s. 3(2).

90. *Ibid.*, s. 2(d).

91. *Ibid.*, s. 4.

In addition, the Minister has been designated to act under the Agricultural and Rural Development Act.⁹² Under this Act the Minister may, with the approval of the Governor in Council, enter into an agreement with a province providing for a joint undertaking, with the provincial government or one of its agencies, of projects for the more efficient use and economic development of rural land specified in the agreement,⁹³ or providing for the payment of contributions towards projects undertaken at the provincial level.⁹⁴ Such projects could conceivably entail the use and development of water resources on or underlying rural lands. The Minister may further undertake research programs directly, or in co-operation with the government of a province or one of its agencies, respecting the more effective use and economic development of rural lands in the province.⁹⁵ The Minister may also, with the approval of the Governor in Council, enter into an agreement with a province providing for a joint undertaking of projects for the development and conservation of water supplies for agricultural or other rural purposes,⁹⁶ or providing for contributions towards provincial undertakings,⁹⁷ and may undertake research programs alone or in co-operation with a province for the development and conservation of water supplies.⁹⁸

DEPARTMENT OF TRANSPORT

This department is presided over by the Minister of Transport,⁹⁹ who has the management, charge and direction of all government railways and canals, and all works and projects appertaining to or incidental to such railways and canals;¹⁰⁰ in addition, his duties, powers and functions extend to such boards and public bodies, subjects, services and properties of the Crown as may be designated or assigned by the Governor in Council.¹⁰¹ More specifically, under the Department of Transport Act,¹⁰² he is charged with directing the construction, maintenance, repair, management and control of all railways and canals and appurtenant works constructed or maintained at the expense of Canada.¹⁰³ Under this Act the Governor in Council may impose a toll structure on canals¹⁰⁴ and may make regulations governing the management, maintenance, proper use and protection of canals or other works under the control of the Minister.¹⁰⁵

Among the duties assigned to the Minister is the administration of the Government Railways Act,¹⁰⁶ which applies to all railways that are vested in the Crown

92. R.S.C., 1970, c. A-4, s. 2, defining "Minister" as such member of the Queen's Privy Council for Canada as is designated by the Governor in Council.

93. *Ibid.*, s. 3(1)(a).

94. *Ibid.*, s. 3(1)(b).

95. *Ibid.*, s. 3(2).

96. *Ibid.*, s. 5(1)(a).

97. *Ibid.*, s. 5(1)(b).

98. *Ibid.*, s. 5(2).

99. Department of Transport Act, R.S.C., 1970, c. T-15, s. 3.

100. *Ibid.*, s. 7(1).

101. *Ibid.*, s. 7(3).

102. R.S.C., 1970, c. T-15.

103. *Ibid.*, s. 9.

104. *Ibid.*, s. 23.

105. *Ibid.*, s. 25.

106. R.S.C., 1970, c. G-11.

or are under the control and management of the Minister.¹⁰⁷ Under this Act, the Minister is empowered to construct works that may interfere in certain respects with existing water flows,¹⁰⁸ although the Act is not directly concerned with the administration of water resources.

The Minister is also charged with the administration of the Canada Shipping Act,¹⁰⁹ which deals with such matters relating to shipping and navigation in inland and territorial waters as the regulation of pilotage,¹¹⁰ the control of light houses, buoys and beacons,¹¹¹ the declaration and regulation of public harbours,¹¹² and the establishment of rules and regulations regarding navigation and collisions.¹¹³ Of greater significance is the fact that the Act has provisions respecting oil pollution,¹¹⁴ under which the Governor in Council may make regulations to carry out the terms of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, aimed at controlling the pollution of inland and coastal waters by ships, and may impose fines for their breach.¹¹⁵ Regulations are currently in effect in this regard.¹¹⁶

The Minister is responsible as well for the administration of the National Harbours Board Act,¹¹⁷ which constitutes, under the direction of the Minister named by the Governor in Council to administer the Act,¹¹⁸ the National Harbours Board, to exercise jurisdiction over certain harbours, including those of Halifax and Saint John.¹¹⁹ The Board also has the management and control of all works and property that on October 1st, 1936 were administered, managed and controlled by any of the corporations constituted to administer the above named harbours,¹²⁰ and all other harbours and works and property of Canada that the Governor in Council may transfer to the Board for administration, management and control.¹²¹ The Board may limit the extent of construction in harbour waters,¹²² and may take land under the provisions of the Expropriation Act.¹²³ The Governor in Council, under the Act, may make by-laws for the direction of the Board and for the administration of harbours, including regulations respecting navigation and berthing in harbour waters,¹²⁴ the use of and lease of harbours or harbour property,¹²⁵ the regulation of construction and maintenance of wharves, piers or other structures within the limits of harbours,¹²⁶ and the imposition and collection of rates and tolls

107. *Ibid.*, s. 4(1).

108. *Ibid.*, s. 5.

109. R.S.C., 1970, c. S-9.

110. *Ibid.*, Part VI.

111. *Ibid.*, Part XI.

112. *Ibid.*, Part XII.

113. *Ibid.*, Part XIV.

114. *Ibid.*, Part IX. [Extensive new provisions have now replaced these provisions; see Addendum, pp. 484-92].

115. *Ibid.*, s. 483.

116. SOR/68-434.

117. R.S.C., 1970, c. N-8.

118. *Ibid.*, s. 2.

119. *Ibid.*, s. 7(1).

120. *Ibid.*, s. 7(1)(a).

121. *Ibid.*, s. 7(1)(b).

122. *Ibid.*, s. 10.

123. *Ibid.*, s. 12(1). Expropriation Act, R.S.C., 1970, 1st Supp., c. 16.

124. *Ibid.*, s. 14(1)(a).

125. *Ibid.*, s. 14(1)(b).

126. *Ibid.*, s. 14(1)(c).

for the use of harbours.¹²⁷ Further, any construction of works in navigable waters under the jurisdiction of the Board must be recommended by the Minister of Transport for approval by the Governor in Council.¹²⁸

The Minister has certain other duties under the Harbour Commissions Act,¹²⁹ which provides for the appointment, by the Governor in Council, of a Harbour Commission to regulate and control the use and development of land, buildings and other property within the limits of a harbour not named in the National Harbours Board Act, or for which a harbour commission has not otherwise been established by Parliament, and all docks, wharves and equipment erected or used in connection therewith.¹³⁰ The Minister also has the control of the use, maintenance and ordinary repair of all harbours, wharves, piers and breakwaters constructed or completed at the expense of Canada, or in any way the property of Canada, under the Government Harbours and Piers Act.¹³¹

The Minister is also charged with the Administration of the Navigable Waters Protection Act,¹³² which is discussed in Chapter Eleven, and the Ferries Act,¹³³ dealing with the licensing and regulation of ferries plying between any province and any British or foreign country, or between any two provinces.

DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

The Department of Indian Affairs and Northern Development is presided over by the Minister of Indian Affairs and Northern Development.¹³⁴ The duties, powers and functions of the Minister extend to matters within federal jurisdiction (not assigned to any other department, branch or agency of Canada) relating to, among other things, national parks,¹³⁵ and migratory birds and other wildlife.¹³⁶ The preservation of waters in parks and wildlife refuges fall within this general sphere. Further responsibilities include the administration of Acts of Parliament not elsewhere assigned relating to these matters,¹³⁷ as well as Acts specifically assigned to the department.

Among the Acts assigned to the department is the Northern Canada Power Commission Act.¹³⁸ Under this Act the Northern Canada Power Commission¹³⁹ is established and empowered, with the approval of the Governor in Council and subject to the laws of an affected province, to undertake surveys and engineering investigations for the development of power projects,¹⁴⁰ to construct and maintain

127. *Ibid.*, s. 14(1)(e).

128. *Ibid.*, s. 37. Additional duties under Part I are imposed by SOR/66-457.

129. R.S.C., 1970, c. H-1.

130. *Ibid.*, ss. 3(1), (9).

131. R.S.C., 1970, c. G-9.

132. R.S.C., 1970, c. N-19, s. 2.

133. R.S.C., 1970, c. F-8, s. 2.

134. R.S.C., 1970, c. I-7, s. 2.

135. *Ibid.*, s. 4(d).

136. *Ibid.*, s. 4(f).

137. *Ibid.*, s. 6(b).

138. R.S.C., 1970, c. N-1. The responsibility was imposed by the Government Organization Act, 1966, (1966-7), 14 & 15 Eliz. II, c. 25, s. 40 (Can.).

139. R.S.C., 1970, c. N-21, s. 3(1).

140. *Ibid.*, s. 6(1)(a).

dams for storage and power purposes, to flood land for the storage of water,¹⁴¹ to raise or lower the level of rivers, lakes, streams and other bodies of water, to make stream or river diversions,¹⁴² and to enter upon and erect plants on, under or over roads, railways, rivers, streams, waterways or lands.¹⁴³ Plants are defined as facilities for the generation, supply, control, transmission or distribution of a public utility, including the site, together with all land, water rights and necessary installations¹⁴⁴ ("public utility" being defined to mean electric energy, thermal energy, water supplies for domestic use or for use in any commercial or manufacturing enterprise or industrial process, sewage services and telephone systems).¹⁴⁵ The Commission also has power to purchase public utilities,¹⁴⁶ and to expropriate.¹⁴⁷ Projects costing over fifty thousand dollars, other than purely maintenance contracts, must be approved by the Governor in Council.¹⁴⁸ The Commission may supply public utilities to municipalities, organizations, corporations or individuals, or to such districts or areas as may be established by the Commission for convenience of administration and supply,¹⁴⁹ and the Commission may establish a rate structure for services.¹⁵⁰ Extensive provision is made for the financing of projects undertaken by the Commission.

Under the Atlantic Provinces Power Development Act,¹⁵¹ the Commission may be charged with the administration of a federal-provincial agreement entered into under that Act.

The Minister also has the administration of the Dominion Water Power Act,¹⁵² which applies to all Dominion water powers, to all public lands required in connection with the development of a water power, to the power and energy produced or produceable from waters on or within such lands, to all undertakings established or carried on in respect of any Dominion water power and to all matters incidental thereto.¹⁵³ "Water power" is defined as any force or energy contained in or capable of being produced or generated from flowing or falling water in such quantity as to make it of commercial value;¹⁵⁴ "water" means any river, brook, lake, pond, creek or other flowing or standing water;¹⁵⁵ a "Dominion water power" means water power on public lands, or water power that is the property of Canada under the control of the Minister;¹⁵⁶ "public lands" are lands of the Canadian govern-

141. *Ibid.*, s. 6(1)(d).

142. *Ibid.*, s. 6(1)(e).

143. *Ibid.*, s. 6(1)(f).

144. *Ibid.*, s. 2.

145. *Ibid.*

146. *Ibid.*, s. 6(1)(h).

147. *Ibid.*, s. 7.

148. *Ibid.*, s. 6(3).

149. *Ibid.*, s. 9.

150. *Ibid.*, s. 10.

151. R.S.C., 1970, c. A-17.

152. R.S.C., 1970, c. W-6. The responsibility was imposed by the Government Organization Act, 1966, (1966-7), 14 & 15 Eliz. II, c. 25, s. 40 (Can.).

153. R.S.C., 1970, c. W-6, s. 3.

154. *Ibid.*, s. 2(f).

155. *Ibid.*, s. 2(d).

156. *Ibid.*, s. 2(a).

ment;¹⁵⁷ and an "undertaking" includes the storage, pondage, penning back, regulation, augmentation, carriage, diversion and use of water.¹⁵⁸ The Act provides for the granting of rights to develop water power,¹⁵⁹ for the expropriation of land necessary for an undertaking or for protecting or developing a water power,¹⁶⁰ for the cancellation of leases and other interests in Crown lands on payment of compensation,¹⁶¹ and for the joint development and operation of two or more water powers where convenient.¹⁶² The Minister may authorize surveys and investigations to facilitate the development of water power,¹⁶³ such surveys being conducted by the Director of Water-Power.¹⁶⁴

The Dominion Water Power Act also gives the Governor in Council wide regulation-making power relating to the storage, pondage, regulation, diversion, carriage or utilization of water and for the protection of sources of supply;¹⁶⁵ to the development, transmission, distribution, sale, exchange, disposal or use of water power on, through or over public or other lands;¹⁶⁶ to the construction, maintenance, operation, purchase and taking over of works necessary for the purpose of the Act, whether on, over or through public or other lands, and for the regulation and control, in the interest of all water users, of the flow of water that may, from time to time, pass through, by or over such works;¹⁶⁷ to the granting and administering of rights, powers and privileges in or with respect to water powers or undertakings;¹⁶⁸ to the construction and regulation of storage works for regulating and augmenting the flow of water required for power and other purposes;¹⁶⁹ to the fixing of charges for the diversion, use or storage of water;¹⁷⁰ and to the regulation of the passage of logs over dams erected under the Act.¹⁷¹

The Minister is further charged with the administration of the National Parks Act¹⁷² and the management and control of national parks.¹⁷³ Under this Act, the Governor in Council may make regulations for the protection of fish and the prevention of the obstruction or pollution of waterways,¹⁷⁴ for the granting of permits for the use in the parks of water for domestic, business and railway purposes,¹⁷⁵ for using and disposing of mineral waters for recreational and therapeutic pur-

157. *Ibid.*, s. 2(c).

158. *Ibid.*, s. 2(e)(i).

159. *Ibid.*, ss. 5, 9, 12.

160. *Ibid.* ss. 6, 7.

161. *Ibid.*, s. 8.

162. *Ibid.*, s. 9.

163. *Ibid.*, s. 10.

164. *Ibid.*, s. 11.

165. *Ibid.*, s. 12(a).

166. *Ibid.*, s. 12(b).

167. *Ibid.*, s. 12(c).

168. *Ibid.*, s. 12(f).

169. *Ibid.*, s. 12(h).

170. *Ibid.*, s. 12(i).

171. *Ibid.*, s. 12(k).

172. R.S.C., 1970, c. N-13. The responsibility was imposed by the Government Organization Act, 1966 (1966-7), 14 & 15 Eliz. II, c. 25, s. 40 (Can.).

173. R.S.C., 1970, c. N-13, s. 5(1).

174. *Ibid.*, s. 7(1)(e).

175. *Ibid.*, s. 7(1)(h)(iv).

poses,¹⁷⁶ and for the establishment of domestic water supply and sewage services.¹⁷⁷ He may further authorize agreements with a province or any person for the development, operation and maintenance in a park of hydroelectric power pursuant to the Dominion Water Power Act for use only in the park,¹⁷⁸ authorize agreements with municipalities or water districts adjacent to a park for the supply of water from the park,¹⁷⁹ and authorize agreements with persons residing on land adjacent to a park for the supply of water from the park for domestic purposes and for use in establishments providing tourist accommodation.¹⁸⁰

Finally, the Minister is responsible for the administration of the Migratory Birds Convention Act,¹⁸¹ under which the Governor in Council may make such regulations as are deemed expedient to protect migratory birds;¹⁸² under this power regulations are in effect prohibiting the pollution of waters frequented by birds.¹⁸³

DEPARTMENT OF PUBLIC WORKS

Under the Public Works Act¹⁸⁴ the Minister of Public Works has the management, charge and direction of the construction and repair of harbours, piers and works for improving navigation and the equipment necessary for this,¹⁸⁵ and has control over properties owned by Canada, including dams, hydraulic works, slides, piers, booms and other works for transmitting timber,¹⁸⁶ except where their control and management has been placed in some other minister or department.¹⁸⁷ He has responsibility for directing the construction, maintenance and repair of such structures, but a work may, by proclamation of the Governor in Council, be withdrawn from his management.¹⁸⁸ The Minister has power to enter into arrangements with provincial governments, municipal councils or other local corporations or authorities for the transfer of works such as harbours and river improvements, where a transfer is found to be convenient.¹⁸⁹ Such an arrangement may be completed by grant of the Governor in Council by order in council.¹⁹⁰ The Governor in Council may also transfer the management and direction of a public work to another minister or department.¹⁹¹

176. *Ibid.*, s. 7(1)(h)(v).

177. *Ibid.*, s. 7(1)(i).

178. *Ibid.*, s. 7(1)(x).

179. *Ibid.*, s. 7(1)(y).

180. *Ibid.*, s. 7(1)(z).

181. R.S.C., 1970, c. M-12. The responsibility was imposed by the Government Organization Act, 1966 (1966-7), 14 & 15 Eliz. II, c. 25, s. 40 (Can.). [Responsibility is now vested in the Minister of the Environment; see Addendum, p. 483].

182. R.S.C., 1970, c. M-12, s. 4(1).

183. SOR/66-361, s. 51.

184. R.S.C., 1970, c. P-38, s. 4.

185. *Ibid.*, s. 9(1)(a).

186. *Ibid.*, s. 9(1)(b).

187. *Ibid.*, s. 10(c).

188. *Ibid.*, s. 11.

189. *Ibid.*, s. 20(1).

190. *Ibid.*, ss. 20(2), 21(1).

191. *Ibid.*, s. 35.

DEPARTMENT OF AGRICULTURE

The Department of Agriculture is presided over by the Minister of Agriculture,¹⁹² whose duties and powers extend to the execution of federal laws relating to agriculture,¹⁹³ arts and manufactures,¹⁹⁴ experimental farms stations,¹⁹⁵ and to such other matters as may be assigned by the Governor in Council.¹⁹⁶

NATIONAL RESEARCH COUNCIL

The National Research Council consists of a president, vice-president (administration), two vice-presidents (scientific), and not more than seventeen other members.¹⁹⁷ The Council has charge of all matters affecting scientific and industrial research in Canada that may be assigned to it by the Committee of the Privy Council on Scientific and Industrial Research,¹⁹⁸ which is constituted by the National Research Council Act.¹⁹⁹ Among the powers of the Council is the power to undertake to promote the utilization of the natural resources of Canada,²⁰⁰ to undertake research to improve conditions in agriculture,²⁰¹ and to publish, with the approval of the Minister designated to act, whatever scientific and technical information the council deems necessary.²⁰²

ATLANTIC DEVELOPMENT COUNCIL

This body was established by the Government Organization Act, 1969,²⁰³ and consists of a membership of not more than eleven appointed by the Governor in Council²⁰⁴ after consultation with the governments of the Atlantic provinces and other bodies so as to reflect the economic structure of the Atlantic region.²⁰⁵ Its function is to act in an advisory capacity to the Minister of Regional Economic Expansion mainly to consider, report on and recommend proposals for fostering the economic expansion and social adjustment of the Atlantic region.²⁰⁶

NATIONAL ENERGY BOARD

The National Energy Board consists of five members, including a chairman and a vice-chairman,²⁰⁷ and has among its duties the responsibility to study matters over which the Parliament of Canada has jurisdiction relating to the exploration for,

192. Department of Agriculture Act, R.S.C., 1970, c. A-10, s. 2.

193. *Ibid.*, s. 5(1)(a).

194. *Ibid.*, s. 5(1)(b).

195. *Ibid.*, s. 5(1)(c).

196. *Ibid.*, s. 5(2).

197. National Research Council Act., R.S.C., 1970, c. N-14, s. 5.

198. *Ibid.*, s. 7.

199. *Ibid.*, s. 4.

200. *Ibid.*, s. 13(c)(i).

201. *Ibid.*, s. 13(c)(vii).

202. *Ibid.*, s. 13(g).

203. (1968-9), 17 & 18 Eliz. II, c. 28, s. 29 (Can.), now R.S.C., 1970, c. R-4, s. 11.

204. R.S.C., 1970, c. R-4, s. 11.

205. *Ibid.*, s. 12.

206. *Ibid.*, s. 13(a).

207. National Energy Board Act, R.S.C., 1970, c. N-6, ss. 3(1), 5(1).

production, recovery, manufacture, processing, transmission, transportation, distribution, sale, purchase, exchange and disposal of energy and sources of energy within and outside Canada. It is to recommend measures it considers necessary or advisable in the public interest for the control, supervision, conservation, use, marketing and development of energy and sources of energy,²⁰⁸ and to study reports at the request of the Minister of Energy, Mines and Resources with a view to recommending desirable arrangements for co-operation with governmental or other agencies in or outside Canada in respect of matters relating to energy and sources of energy.²⁰⁹ Insofar as water is a prime source of energy, it falls within the purview of the Board.

DEPARTMENT OF NATIONAL HEALTH AND WELFARE

Under the Department of National Health and Welfare Act,²¹⁰ the Minister of National Health and Welfare is assigned such broad matters as research into public health and welfare,²¹¹ the enforcement of rules and regulations made by the International Joint Commission relating to public health,²¹² the distribution of information relating to public health and sanitation,²¹³ co-operation with provincial authorities to co-ordinate efforts for preserving public health in Canada,²¹⁴ and the administration of such Acts, orders and regulations relating to public health as are not assigned to any other department of the government.²¹⁵ These duties would extend to water resources insofar as their state may affect public health.

DEPARTMENT OF INDUSTRY, TRADE AND COMMERCE

The Department of Industry, Trade and Commerce is presided over by the Minister of Industry, Trade and Commerce.²¹⁶ Among his duties is the administration of the Statistics Act,²¹⁷ which constitutes the Dominion Bureau of Statistics.²¹⁸ The duties of the Bureau are to collect, compile, analyze, abstract and publish statistical information relative to the commercial, industrial, financial, social, economic and general activities and condition of the people of Canada.²¹⁹ The Act further provides for the appointment by the Governor in Council of a Dominion Statistician,²²⁰ among whose specified functions is the duty to prepare annually a report on statistics of commerce and navigation between Canada and foreign coun-

208. *Ibid.*, s. 22(1).

209. *Ibid.*, s. 22(2).

210. R.S.C., 1970, c. N.9.

211. *Ibid.*, s. 5(b).

212. *Ibid.*, s. 5(f). [Enforcement of these is now the responsibility of the Minister of the Environment; see Addendum, p. 483].

213. *Ibid.*, s. 5(h).

214. *Ibid.*, s. 5(i).

215. *Ibid.*, s. 5(a).

216. Government Organization Act, 1969, (1968-9), 17 & 18 Eliz. II, c. 28, s. 13 (Can.), now R.S.C., 1970, c. I-11, s. 2.

217. R.S.C. 1970, c. S-16. The responsibility was imposed by the Government Organization Act, 1969, (1968-9), 17 & 18 Eliz. II, c. 28, s. 101 (Can.).

218. R.S.C., 1970, c. S-16, s. 3. [A new Statistics Act (1970-71), 19-20 Eliz. II, c. 15 has now replaced this Act. The bureau is now called Statistics Canada and is headed by the Chief Statistician of Canada; see ss. 3, 4].

219. *Ibid.*, s. 3(a).

220. *Ibid.*, s. 4(1).

tries²²¹ and such reports as the Minister may require on the statistics of commerce and navigation on the inland waterways of Canada, or in connection with the coastal trade of Canada, or both.²²² Generally, the Governor in Council or the Minister has authority to direct the Bureau to collect, compile, analyze, abstract and publish statistics relating to any matter either wishes to prescribe,²²³ including, presumably, statistical analysis of water uses.

CENTRAL MORTGAGE AND HOUSING CORPORATION

This body exists by virtue of the Central Mortgage and Housing Corporation Act,²²⁴ and is constituted by the Honourable Robert Andras²²⁵ and a board of directors appointed in accordance with the Act. The main duties of the Corporation are conferred by the National Housing Act, 1954.²²⁶ Under this Act, the Corporation may, with a view to the elimination and prevention of water and soil pollution, make a loan to any province, municipality or municipal sewerage corporation, for the purpose of assisting in the construction or expansion of a sewage treatment plant,²²⁷ up to two-thirds of the cost of the project.²²⁸ Conditions for such loans are set out in the Act and relate to such matters as interest,²²⁹ duration,²³⁰ security²³¹ and terms of repayment.²³² A further provision sets out that a loan may only be made if evidence satisfactory to the Corporation has been furnished as to the need for the construction or expansion of the sewage treatment project for which the loan is sought.²³³ Other provisions relate to the forgiveness of a percentage of the principal amount of the loan.²³⁴

DEPARTMENT OF EXTERNAL AFFAIRS

The Department of External Affairs is presided over by the Secretary of State for External Affairs.²³⁵ The Secretary of State is responsible for the conduct of all official communications between the government of Canada and the government of any other country in connection with the external affairs of Canada, as well as such other duties as may be assigned by order of the Governor in Council in relation to external affairs, or to the conduct and management of international or inter-colonial negotiations.²³⁶ Within this broad sphere would be the use, development and protection of water resources on an international plane.

221. *Ibid.*, s. 22(a).

222. *Ibid.*, s. 22(c).

223. *Ibid.*, s. 32(m).

224. R.S.C., 1970, c. C-16, s. 3.

225. SOR/69-221.

226. R.S.C., 1970, c. N-10.

227. *Ibid.*, s. 51(1).

228. *Ibid.*, s. 51(2)(b).

229. *Ibid.*, s. 51(2)(a).

230. *Ibid.*, s. 51(2)(c).

231. *Ibid.*, s. 51(2)(d).

232. *Ibid.*, s. 51(2)(e).

233. *Ibid.*, s. 51(3).

234. *Ibid.*, s. 52.

235. Department of External Affairs Act, R.S.C., 1970, c. E-20, s. 2.

236. *Ibid.*, s. 4.

INTERNATIONAL JOINT COMMISSION

Reference should perhaps be made to the International Joint Commission. It is, however, an international body and is therefore dealt with in Chapter Seventeen.

GENERAL EXPROPRIATION POWERS

The power to expropriate property derives entirely from statute. It is a subject of great magnitude, supporting considerable case law, and can only be touched upon briefly in this study.

In the course of this work reference has been made from time to time to powers of expropriation vested in various authorities under federal legislation. In order to determine the procedure for expropriation and the manner of payment of compensation reference must be had to the specific statute creating the power. In many cases the provisions of the Expropriation Act²³⁷ are incorporated by reference.

For present purposes, discussions will be limited to a general summary of some of the major provisions of the Expropriation Act. Under this Act any interest in land that, in the opinion of the Minister of Public Works²³⁸, is required by the Crown for a public work or other public purpose may be expropriated²³⁹.

The procedure is quite detailed. In summary, however, when a decision to expropriate is made, the Minister directs the Attorney General of Canada to register a notice and place it in the appropriate registry office, to search the property to determine who may have an interest in it, and to forward a report to the Minister setting forth the names of interested parties.²⁴⁰ The Minister must then cause a copy of the notice to be published²⁴¹ and to be sent personally to each person named in the report.²⁴² A person objecting to the intended expropriation may, within thirty days of the notice, serve on the Minister an objection stating the basis for it.²⁴³ The Minister will then order a public hearing to be conducted²⁴⁴ before a hearing officer.²⁴⁵ The hearing officer is required to fix a date for a hearing and give notification of the time and place,²⁴⁶ hear objecting parties,²⁴⁷ make any necessary inspection of the land,²⁴⁸ and submit a report to the Minister.²⁴⁹ The Minister may then confirm his intention to expropriate by requesting the Attorney General to register a Notice of Confirmation.²⁵⁰ The interest thereupon becomes absolutely vested in the Crown²⁵¹ although there are provisions restricting the right

237. R.S.C., 1970, 1st Supp., c. 16.

238. *Ibid.*, s. 2.

239. *Ibid.*, s. 3.

240. *Ibid.*, s. 4.

241. *Ibid.*, s. 6(1)(a).

242. *Ibid.*, s. 6(1)(b).

243. *Ibid.*, s. 7.

244. *Ibid.*, s. 8(1).

245. *Ibid.*, s. 8(2).

246. *Ibid.*, s. 8(4)(a).

247. *Ibid.*, s. 8(4)(b).

248. *Ibid.*, s. 8(4)(c).

249. *Ibid.*, s. 8(4)(d).

250. *Ibid.*, s. 12.

251. *Ibid.*, s. 13.

to take physical possession.²⁵² A copy of the Notice of Confirmation is sent to each person having an interest in the property²⁵³ followed by an offer of compensation²⁵⁴ based on a written appraisal of the value of each person's interest.²⁵⁵ The Act contains detailed provisions for determining the value of an expropriated interest. The basic test is market value, the amount that would have been paid if, at the time of its taking, it had been sold in the open market by a willing seller to a willing buyer,²⁵⁶ but rules are provided for special situations.²⁵⁷

When the owner and the Minister are unable to agree on the amount of compensation either may serve on the other a notice to negotiate settlement.²⁵⁸ The Minister then refers the matter to a negotiator, appointed under the Act,²⁵⁹ who must meet with the parties, inspect the land, receive and consider appraisals, valuations and other evidence submitted to him by the parties and endeavour to settle the dispute.²⁶⁰ If negotiation is unsuccessful, or if no notice to negotiate is given, the owner or the Attorney General may commence proceedings in the Exchequer Court (now the Federal Court) of Canada.²⁶¹ The Court will adjudicate on the claim, the interest payable by the Crown²⁶² and the costs of the action.²⁶³

The Act also makes provision for other Ministers to undertake limited compulsory interferences with private property. A Minister may, after giving seven days notice to the owner, enter lands to undertake surveys, take levels, make borings and sink trial pits for a purpose related to a public work, deposit material required for a public work, dig, quarry and remove material from private lands, make temporary roads and drains, divert temporarily or permanently the course of watercourses, railways and roads, and alter the position of utilities on private lands.²⁶⁴ However, compensation is to be paid by the Crown to persons sustaining damage in the amount to which the Crown would be liable if the power had not been exercised under statutory authority.²⁶⁵ In other words, no defence of statutory authority will be entertained.

252. *Ibid.*, s. 17(1).

253. *Ibid.*, s. 14(1)(a).

254. *Ibid.*, s. 14(1)(b).

255. *Ibid.*, s. 14(3).

256. *Ibid.*, s. 24(2).

257. *Ibid.*, ss. 24(3)-(9), 25, 26.

258. *Ibid.*, s. 28(1).

259. *Ibid.*, s. 28(2).

260. *Ibid.*, s. 28(3).

261. *Ibid.*, s. 29. [The Exchequer Court has been continued in the Federal Court; see R.S.C., 1970, c. 10 (2nd Supp.)].

262. See s. 33 for rules relating to interest payable by the Crown.

263. *Ibid.*, s. 36.

264. *Ibid.*, s. 37.

265. *Ibid.*, s. 40.

CHAPTER THREE

New Brunswick Administrative Powers

By Alan D. Reid

PROVINCIAL STRUCTURE

General

Various departments and agencies of the government of New Brunswick exercise powers and responsibilities that affect the development and use of water resources in the province. In some cases responsibilities are conferred by statute upon a particular minister or agency; in other cases responsibilities are conferred by statute upon a person to be designated by order in council. It is of note that New Brunswick legislation does not directly provide for a departmental structure; none of the departments of government exist by legislative provision. Presumably, the structure was originally instituted by royal prerogative and has subsequently developed through customary practices.

Government departments are headed by members of the Executive Council, which is composed, by virtue of the Executive Council Act,¹ of such persons as the Lieutenant-Governor from time to time thinks fit; from the Council, the Lieutenant-Governor may appoint a Minister of Justice, a Minister of Finance, a Provincial Secretary, a Minister of Public Works, a Minister of Highways, a Minister of Natural Resources, a Minister of Agriculture and Rural Development, a Minister of Health and Welfare, a Minister of Labour, a Minister of Education, a Minister of Municipal Affairs, a Minister of Economic Growth, a Minister of Fisheries and a Minister of Youth,² who exercise administrative responsibilities under various Acts of the legislature, and may further be required to exercise duties prescribed from time to time by order in council.³ By virtue of amendments to the Executive Council Act over the years, responsibilities have shifted, and the departmental structure has been altered. The Act now provides that a right, power, duty, function, responsibility or authority vested in or imposed on a Minister by any Act of the legislature or of Parliament may be transferred to such other Minister as the Lieutenant-Governor in Council may designate,⁴ which means that responsibilities may freely be shifted by order in council rather than by statutory enactment or amendment.

1. R.S.N.B., 1952, c. 75.

2. *Ibid.*, s. 2, as enacted by (1968), 17 Eliz. II, c. 27, s. 1 (N.B.).

3. *Ibid.*, c. 3(1).

4. *Ibid.*, s. 3(7), as enacted by (1968), 17 Eliz. II, c. 27, s. 2 (N.B.). [Reference should also be made to the Clean Environment Act; see Addendum, pp. 493-6].

New Brunswick Water Authority

The New Brunswick Water Authority exists by virtue of the Water Act,⁵ and consists of not less than five and not more than nine members, of whom one is the chairman,⁶ and four represent the Departments of Economic Growth, Natural Resources, Municipal Affairs, and Agriculture, and the New Brunswick Electric Power Commission. The Authority is responsible to the Minister of Natural Resources.⁷ Under the Act, the Lieutenant-Governor in Council is empowered to appoint an Advisory Board to the Water Authority, consisting of not less than ten and not more than fifteen members, of whom one must be appointed from each of the Departments of Agriculture and Rural Development, Health and Welfare, Finance, Natural Resources, Municipal Affairs, Public Works, as well as the New Brunswick Electric Power Commission.⁸ He may also appoint local advisory boards for specified areas, or designate an existing board, commission or other body as a local advisory board responsible to the Authority,⁹ and may establish a Board to plan, conduct and implement programs for the more effective management of water resources.¹⁰ He may also authorize the Minister to enter into agreements with the Canadian or other governments to provide for the planning, conducting and implementing of programs for the more effective management of water resources.¹¹

The Authority has control over the use of all surface, ground and shore waters,¹² the allocation of the use of water,¹³ pollution originating within the jurisdiction of the province,¹⁴ the alteration of the natural features of watercourses and lakes and the natural movement of water therein.¹⁵ In order to carry out the provisions of the Act, the Lieutenant-Governor in Council is empowered to make regulations.¹⁶

The Act makes provision for the extension of aid to municipalities. The Minister of Natural Resources, with the approval of the Lieutenant-Governor in Council, may assist a municipality with any plan, works or undertaking for controlling or preventing pollution or for the establishment of waterworks¹⁷ and may defray part of the cost thereof,¹⁸ may guarantee a loan for such a purpose,¹⁹ or pay all or part of the interest on such a loan.²⁰

5. (1960-1), 9 & 10 Eliz. II, c. 19, s. 2(1), as enacted by (1969), 18 Eliz. II, c. 75, s. 1 (N.B.).

6. *Ibid.*, s. 2(2), as enacted by (1969), 18 Eliz. II, c. 75, s. 2 (N.B.). [The membership has now been altered; see Addendum, p. 496].

7. *Ibid.*, s. 2(5), as enacted by (1969), 18 Eliz. II, c. 75, s. 1 (N.B.). [Now the Minister of Fisheries and Environment; see Addendum, p. 496].

8. *Ibid.*, s. 3(a), as enacted by (1968), 17 Eliz. II, c. 58, s. 2 (N.B.). [Now abolished, but reference should be made to the environmental council under the Clean Environment Act, see Addendum, pp. 493-4].

9. *Ibid.*, s. 3(d).

10. *Ibid.*, ss. 3(e), (f), as enacted by (1969), 18 Eliz. II, c. 75, s. 2 (N.B.).

11. *Ibid.*, s. 3(g), as enacted by (1969), 18 Eliz. II, c. 75, s. 2 (N.B.).

12. *Ibid.*, s. 4(a).

13. *Ibid.*, s. 4(b).

14. *Ibid.*, s. 4(c).

15. *Ibid.*, s. 4(d). [See also the Clean Environment Act; see Addendum, p. 494].

16. *Ibid.*, s. 5(1).

17. *Ibid.*, s. 7(a), as enacted by (1969), 18 Eliz. II, c. 75, s. 3 (N.B.). See also SOR (1963 Cons.), reg. 170, ss. 4, 5 (N.B.).

18. *Ibid.*, s. 7(b), as enacted by (1966), 15 Eliz. II, c. 159, s. 2 (N.B.).

19. *Ibid.*, s. 7(c), as enacted by (1966), 15 Eliz. II, c. 159, s. 2 (N.B.).

20. *Ibid.*, s. 7(d), as enacted by (1966), 15 Eliz. II, c. 159, s. 2 (N.B.).

The Minister is also empowered, with the approval of the Lieutenant-Governor in Council, to enter into agreements respecting the acquisition, establishment, operation, alteration or extension of waterworks or sewage works,²¹ "waterworks" being defined as any public, commercial or industrial works for the collection, production, treatment, storage, supply and distribution of water,²² and "sewage works" as any works for the collection, transmission, treatment and disposal of sewage.²³

Further provision is made for the appointment and incorporation, by the Lieutenant-Governor in Council, of a board of from three to seven persons²⁴ for the purpose of acquiring, constructing, establishing, enlarging, controlling, managing, maintaining and operating a water or sewage works,²⁵ for providing water to a municipality or person,²⁶ for receiving, treating or disposing of sewage from a municipality or person,²⁷ for entering into agreements with a municipality or person with respect to the above matters,²⁸ and for operating a water or sewage works on behalf of a government, municipality or person.²⁹

The Minister exercises control over the construction and operation of waterworks and sewage works. Where a municipality or person contemplates the establishment, extension or alteration of a water³⁰ or sewage works,³¹ the plans, specifications and an engineer's report, together with such other information as the Authority may require, must be submitted to the Authority for the approval of both the Minister of Natural Resources and the Minister of Health and Welfare. If work has been undertaken without such approval, the Minister may order an investigation of the works, the source of the water supply or the location of the discharge of effluent, as the case may be, and may order changes to be made which he deems necessary.³² The Minister may withhold his approval where he deems it to be in the public interest to do so.³³ Furthermore, where the Minister of Health and Welfare is of opinion that the quality of water in an existing waterworks is a public health hazard,³⁴ or where the Minister of Natural Resources decides that an existing waterworks requires alteration,³⁵ or sewage requires sewage works,³⁶ or an existing sewage works requires alteration,³⁷ alterations may be ordered by the respective Ministers. Both waterworks and sewage works have to be maintained, repaired and operated as directed by the Minister of Natural Resources.³⁸

21. *Ibid.*, s. 7A, as enacted by (1966), 15 Eliz. II, c. 159, s. 3 (N.B.). [Now the Minister of Fisheries and Environment; see Addendum, p. 496].

22. *Ibid.*, s. 1(h).

23. *Ibid.*, s. 1(g).

24. *Ibid.*, s. 7B(1)(a), as enacted by (1966), 15 Eliz. II, c. 159, s. 3 (N.B.).

25. *Ibid.*, s. 7B(2)(a), as enacted by (1966), 15 Eliz. II, c. 159, s. 3 (N.B.).

26. *Ibid.*, s. 7B(2)(b), as enacted by (1966), 15 Eliz. II, c. 159, s. 3 (N.B.).

27. *Ibid.*, s. 7B(2)(c), as enacted by (1966), 15 Eliz. II, c. 159, s. 3 (N.B.).

28. *Ibid.*, s. 7B(2)(d), as enacted by (1966), Eliz. II, c. 159, s. 3 (N.B.).

29. *Ibid.*, s. 7B(2)(i), as enacted by (1966), 15 Eliz. II, c. 159, s. 3 (N.B.).

30. *Ibid.*, s. 8(1). [Powers of the Minister of Health and Welfare under the Act are now exercised by the Minister of Health; see Addendum, p. 496].

31. *Ibid.*, s. 9(1).

32. *Ibid.*, ss. 8(2), 9(2).

33. *Ibid.*, ss. 8(3), 9(3).

34. *Ibid.*, s. 8(4)(a).

35. *Ibid.*, s. 8(4)(b).

36. *Ibid.*, s. 9(4)(a).

37. *Ibid.*, s. 9(4)(b).

38. *Ibid.*, ss. 8(5), 9(5).

It is further provided that where a municipality or person contemplates a hydro-electric power project, a control dam, a river diversion, a drainage diversion, or any alteration of a lake or watercourse or of water flowing therein, the plans and such other information as the Authority may require shall be submitted to the Authority for the approval of the Minister before such work may be undertaken.³⁹

Under the Act it is an offence for a municipality or person, without the approval of the Minister of Natural Resources and the Minister of Health and Welfare, to discharge or deposit material of any kind into a well, lake, river, pond, spring, stream, reservoir or other water or watercourse or on ice lying therein, or on a shore or bank or into any place that may cause pollution or impair the quality of the water for beneficial use.⁴⁰ The Authority is further empowered to define and prescribe an area surrounding a source of public water supply,⁴¹ in which case the owner or user of the public water supply must give notice of the prescribed area⁴² and must protect the source.⁴³ The depositing of pollutants in such an area, or bathing, washing, fishing, boating or otherwise impairing the quality of the water without the approval of the Authority is an offence.⁴⁴

Department of Natural Resources

The Minister of Natural Resources exercises responsibilities under several Acts that relate in various ways to water resources.⁴⁵ Under the Mining Act,⁴⁶ the Minister may control the drainage of mining areas⁴⁷ and the pollution of water through mining operations by making regulations respecting the disposal of tailings, slimes, waste products, or other noxious or deleterious substances upon lands or into waters.⁴⁸

The Minister exercises further powers under the Fisheries Act.⁴⁹ He is empowered to issue leases and licences⁵⁰ for fishing on waters within the province over which the legislature is competent to legislate;⁵¹ he may set aside waters for the natural or artificial propagation of fish,⁵² and may make regulations to prevent the destruction of fish,⁵³ to prohibit fishing in provincial waters without a fishery lease or licence,⁵⁴ and to preserve fish and fisheries in provincial waters.⁵⁵

The Minister is also charged with the administration of the Crown Lands Act.⁵⁶ This Act empowers the Lieutenant-Governor in Council to authorize surveys

39. *Ibid.*, s. 12(1), as amended by (1966), 15 Eliz. II, c. 159, s. 5 (N.B.).

40. *Ibid.*, s. 10, as enacted by (1968), 17 Eliz. II, c. 58, s. 6 (N.B.). [Now the Minister of Fisheries and Environment, and Health; see Addendum, pp. 493, 496].

41. *Ibid.*, s. 11(1), as enacted by (1966), 15 Eliz. II, c. 159, s. 4 (N.B.).

42. *Ibid.*, s. 11(1)(a), as enacted by (1966), 15 Eliz. II, c. 159, s. 4 (N.B.).

43. *Ibid.*, s. 11(1)(b), as enacted by (1966), 15 Eliz. II, c. 159, s. 4 (N.B.).

44. *Ibid.*, s. 11(2), as enacted by (1966), 15 Eliz. II, c. 159, s. 4 (N.B.).

45. There is no Act specifically setting up the department and imposing responsibilities as at the federal level. See discussion in general part, p. 91.

46. (1961-2), 10 & 11 Eliz. II, c. 45 (N.B.).

47. *Ibid.*, ss. 94-100.

48. *Ibid.*, s. 27(1)(a).

49. R.S.N.B., 1952, c. 87, s. 1(i), as enacted by (1967), 16 Eliz. II, c. 42, s. 1 (N.B.), defining "Minister" as the Minister of Natural Resources, or Minister assigned to administer the Act.

50. *Ibid.*, s. 5.

51. *Ibid.*, s. 1(m).

52. *Ibid.*, s. 3(1).

53. *Ibid.*, s. 21(1)(c).

54. *Ibid.*, s. 21(1)(d).

55. *Ibid.*, s. 21(1)(e).

56. R.S.N.B., 1952, c. 53.

of Crown lands, which must be filed with the Minister,⁵⁷ and to authorize the Minister to issue forest management licences⁵⁸ and grant leases of Crown Lands for various other purposes which he may deem advisable.⁵⁹ "Crown Lands" are specifically defined to include public lands in the right of the province that are covered by water;⁶⁰ this, in effect, gives the Minister power to lease certain public waters.

Other duties are placed upon the Minister by the Waters Storage Act⁶¹ (which prohibits the construction of a dam, boom or other work having the effect of impounding, holding back or storing up waters of a river, stream or lake until plans and specifications are approved by the Lieutenant-Governor in Council).⁶² It is provided that where such construction was undertaken before the passing of the Act,⁶³ and the water flows under a highway bridge, railway bridge or culvert further down its course, the person maintaining the dam must file the plans and specifications with the Minister,⁶⁴ or suffer the Minister to prepare them at the former's expense.⁶⁵ The provisions of the Act are discussed more fully in Chapter Twelve.

The Minister will have further duties under the Dams and Sluiceways Act⁶⁶ when that Act is proclaimed. It provides that where a person requires a sluiceway to drive logs over a dam erected or to be erected across a river,⁶⁷ and a surveyor recommends that a sluiceway be built, the Minister may serve notice on the owner or occupier of the dam or dam site requiring him to build a sluiceway under such conditions as the Minister deems necessary.⁶⁸ In default of this the Minister may have the sluiceway built at the owner's expense.⁶⁹ The provisions of this Act are more fully discussed in Chapter Twelve.

Other responsibilities are placed on the Minister by the Stream Driving Companies Act,⁷⁰ which provides for the conferring of specified powers by letters patent upon a company incorporated under the Companies Act for the purpose of acquiring or constructing and maintaining a work to facilitate the transmission of timber down a river or stream in the province, or for the purpose of blasting rocks, dredging or removing shoals or other impediments, or otherwise improving the navigation of a river or stream.⁷¹

The Minister has further administrative duties under the Water Act,⁷² discussed above.⁷³

57. *Ibid.*, s. 3.

58. *Ibid.*, s. 6, as enacted by (1968), 17 Eliz. II, c. 24, s. 3 (N.B.).

59. *Ibid.*, s. 65(1), as enacted by (1959), 8 Eliz. II, c. 39, s. 3 (N.B.).

60. *Ibid.*, s. 1(b).

61. R.S.N.B., 1952, c. 248.

62. *Ibid.*, s. 1.

63. 1921.

64. R.S.N.B., 1952, c. 248, s. 3(1).

65. *Ibid.*, s. 3(2).

66. (1966), 15 Eliz. II, c. 7 (N.B.).

67. *Ibid.*, s. 3.

68. *Ibid.*, s. 4(1).

69. *Ibid.*, ss. 4(2), (3).

70. R.S.N.B., 1952, c. 219.

71. *Ibid.*, s. 2.

72. (1960-1), 9 & 10 Eliz. II, c. 19 (N.B.). [Now the Minister of Fisheries and Environment; see Addendum, p. 493].

73. See pp. 92-4.

New Brunswick Electric Power Commission

The New Brunswick Electric Power Commission consists of not more than seven members appointed by the Lieutenant-Governor in Council.⁷⁴ The Act provides for the appointment of a chairman and a vice-chairman,⁷⁵ and for the designation of executive members,⁷⁶ who have the immediate supervision of the works and undertakings of the Commission, subject to the direction and approval of the Commission.⁷⁷ The Commission is set up as a Crown corporation and an agent of the Crown,⁷⁸ and has all rights, powers and privileges conferred upon a company by the Companies Act.⁷⁹

The purpose of the Act is to provide for the continuous supply of energy adequate for the present needs and future development of the province and to promote economy and efficiency in the generation, distribution, supply, sale and use of power.⁸⁰ In effecting these objects, the Commission is given power: to construct, maintain and operate works for generating electrical energy from water power and other means, and for transmitting such energy;⁸¹ to construct, maintain and operate dams, sluices, canals, raceways and other works upon, through, over, under, along and across public land, public highways or other public places, streams, watercourses, bridges, viaducts or railways and with or without the consent of the owner to flood and overflow land and generally to do acts which it deems necessary for storing water or for any other purpose in connection with such works.⁸² Where, however, the exercise of this authority may constitute an obstruction to the construction, improvement, maintenance or repair of public land, public highways, public places, bridges, viaducts, or railways, or their normal use, a report must be made to the Minister of Highways, and his consent obtained.⁸³ The Commission may also purchase, lease or otherwise acquire by non-compulsory means, or, without the consent of the owner, expropriate water, water power, privileges and works developed, operated, used or adapted for generating electrical energy by any means and from any source of power,⁸⁴ as well as land upon which any water power or water privilege is situate and any river, stream, or other body of water which the Commission deems is capable of improvement or development for the purpose of providing water power.⁸⁵ These powers extend as well to land which the Commission deems necessary for the full enjoyment and exercise of any water power, water privilege or works of the Commission,⁸⁶ and land and wells producing or capable of producing any material adapted or adaptable for the generation of electrical energy.⁸⁷ Before it exercises compulsory powers, however,

74. Electric Power Act, (1961-2), 10 & 11 Eliz. II, c. 41, s. 3(1) (N.B.).

75. *Ibid.*, s. 3(2).

76. *Ibid.*, s. 4(2).

77. *Ibid.*, s. 4(3).

78. *Ibid.*, s. 5.

79. *Ibid.*, s. 7.

80. *Ibid.*, s. 2.

81. *Ibid.*, s. 24(1)(a).

82. *Ibid.*, s. 24(1)(b).

83. *Ibid.*, s. 24(3)(b), as enacted by (1970), 19 Eliz. II, c. 19, s. 9 (N.B.).

84. *Ibid.*, s. 24(1)(c)(i).

85. *Ibid.*, s. 24(1)(c)(ii).

86. *Ibid.*, s. 24(1)(c)(iii).

87. *Ibid.*, s. 24(1)(c)(iv).

a report must be made to the Lieutenant-Governor in Council and his authorization obtained.⁸⁸ Provision is made for the vesting in the Commission of lands compulsorily taken,⁸⁹ and for the fixing of compensation.⁹⁰

Department of Agriculture and Rural Development

The Minister of Agriculture and Rural Development exercises duties and responsibilities under several statutes relating to water resources. Under the Marshland Reclamation Act,⁹¹ the Minister has power to construct, maintain and operate dykes, aboiteaux, breakwaters, canals, ditches, drains, roads and other structures for the reclamation, development, improvement or protection of marshland,⁹² and to enter into agreements with the Canadian Government, a marsh body or any person for these purposes.⁹³ Provincial contribution under such an agreement cannot exceed one-half the cost of the project,⁹⁴ and the work must previously be recommended by the Marshland Reclamation Commission.⁹⁵ This is a commission of from three to seven members appointed by the Lieutenant-Governor in Council.⁹⁶ Its duties are to advise the Minister on matters related to the reclamation and protection of marshland and its development and maintenance for agricultural purposes, and to study and examine proposals for the construction, reconstruction, repair, maintenance, conduct or operation of works with a view to making recommendations to the Minister.⁹⁷

The Act further provides that the Minister may incorporate "marsh bodies" upon receipt of a petition from owners of marshland, if he is satisfied that the petition is signed by not less than two-thirds of the owners of marshland within the area who are resident in the province,⁹⁸ and that the persons signing the petition together own not less than one-half of the marshland in the area,⁹⁹ and if, in addition, the Marshland Reclamation Commission has recommended the issue of certificate of incorporation.¹⁰⁰ A marsh body, so incorporated, is empowered to acquire, hold, sell and lease real and personal property,¹⁰¹ to construct and operate works,¹⁰² to enter into agreements with the province or any person for such works,¹⁰³ to make regulations respecting such works or lands,¹⁰⁴ to raise money by borrowing¹⁰⁵ and to do other acts incidental to the attainment of its objects.¹⁰⁶ The

88. *Ibid.*, s. 24(3)(a).

89. *Ibid.*, s. 25.

90. *Ibid.*, ss. 29-33.

91. R.S.N.B., 1952, c. 141.

92. *Ibid.*, s. 2.

93. *Ibid.*, s. 3, as enacted by (1966), 15 Eliz. II, c. 77, s. 1 (N.B.).

94. *Ibid.*, s. 4.

95. *Ibid.*, s. 5.

96. *Ibid.*, s. 6(1).

97. *Ibid.*, s. 9.

98. *Ibid.*, s. 11(1)(a).

99. *Ibid.*, s. 11(1)(b).

100. *Ibid.*, s. 12(1).

101. *Ibid.*, s. 14(a).

102. *Ibid.*, s. 14(b).

103. *Ibid.*, s. 14(c).

104. *Ibid.*, s. 14(d).

105. *Ibid.*, s. 14(e), as enacted by (1966), 15 Eliz. II, c. 77, s. 2 (N.B.).

106. *Ibid.*, s. 14(f).

Act provides for the election of an executive committee of a marsh body,¹⁰⁷ which is charged with the management and direction of the business and affairs of the body.¹⁰⁸ The executive committee must prepare budgets¹⁰⁹ estimating the amount required for the purposes of the body for the current year. A body, through its executive committee, agents and workmen, and the members of the Commission, its agents and workmen, may enter upon lands within or abutting the area, for the purpose of carrying out the objects of the Act.¹¹⁰ Powers of expropriation are conferred upon the executive committee.¹¹¹

Upon the Minister's recommendation, the Lieutenant-Governor in Council may make regulations relating to the activities of marsh bodies¹¹² and of the Marshland Reclamation Commission,¹¹³ and to provide for the discontinuance and winding-up of commissioners of sewers, marsh districts and other bodies established for the reclamation or protection of marshland.¹¹⁴

The Minister of Agriculture and Rural Development has further responsibilities under the Agricultural Rehabilitation and Development Act.¹¹⁵ This Act is concerned mainly with the formation and carrying out of federal-provincial agreements respecting joint undertakings, for the more efficient use and economic development of marginal or sub-marginal agricultural lands specified in such agreements, or respecting payment to the province of contributions in respect of such projects undertaken by the provincial government or an agency. The Minister is empowered to enter into these agreements,¹¹⁶ and to prepare and undertake, directly or in co-operation with the government of Canada or an agency thereof, programs of research and investigation respecting the more efficient use and economic development of agricultural lands in the province.¹¹⁷ Among the specified areas for development is soil improvement and conservation, and the development and conservation of water supplies for agricultural purposes.¹¹⁸

Under the Act the Lieutenant-Governor in Council is empowered to create a body corporate and politic as an agency of the government of the province for the purpose of carrying out any terms of an agreement,¹¹⁹ and may vest in any such agency powers and duties necessary or expedient for the purposes of carrying out any terms of an agreement.¹²⁰ The Minister may, with the approval of the Lieutenant-Governor in Council, enter into an agreement with any such agency, or a person or municipality, for the joint execution of any project to which an agreement relates,¹²¹ and may purchase or otherwise acquire real and personal property for such a project.¹²² The Minister may establish advisory committees

107. *Ibid.*, s. 19(1).

108. *Ibid.*, s. 15.

109. *Ibid.*, s. 32, as enacted by (1966), 15 Eliz. II, c. 77, s. 3 (N.B.).

110. *Ibid.*, s. 49.

111. *Ibid.*, s. 50.

112. *Ibid.*, s. 57(a), (b).

113. *Ibid.*, s. 57(c).

114. *Ibid.*, s. 57(d).

115. (1961-2), 10 & 11 Eliz. II, c. 38 (N.B.).

116. *Ibid.*, s. 2(1).

117. *Ibid.*, s. 2(2).

118. *Ibid.*, s. 4.

119. *Ibid.*, s. 6(1)(a).

120. *Ibid.*, s. 6(1)(b).

121. *Ibid.*, s. 6(2)(a).

122. *Ibid.*, s. 6(2)(b).

for the purpose of carrying out the provisions of the Act,¹²³ and may, in addition to any agreement made under the Act, grant financial assistance to a person for alternative uses of land.¹²⁴ Under the Act, however, agreements providing for the expenditure of provincial monies are ineffective until such monies have been appropriated by the legislature.¹²⁵ Finally, the Lieutenant-Governor in Council is given regulation-making power to implement the provisions of the Act.¹²⁶

The Minister of Agriculture and Rural Development has further duties under the Drainage of Farm Lands Act,¹²⁷ which provides a means for draining farm land through adjacent property where conditions of necessity exist. The provisions of this Act are discussed in greater detail in connection with the New Brunswick statutes affecting surface and ground water.¹²⁸

Department of Health and Welfare

The Minister of Health and Welfare is responsible for the administration of the Health Act,¹²⁹ which contains provisions related to public health aspects of the use of and interference with water resources. The Minister must certify all plans, specifications, engineers' reports, estimates, and all information and data, and an analysis of water in connection with a system of water works for public consumption, or sewage disposal, proposed by a municipality or person,¹³⁰ and may order alterations in the plans.¹³¹ The Minister may further order changes or additions to be made to an existing water works or sewage system where he is of the opinion that it is of such a character as to be a menace to public health,¹³² and may apply to a judge of the Supreme Court for an order restraining the use of such a system until the changes have been carried out, or may effect the necessary changes directly.¹³³ "Waterworks" is broadly defined in the Act to include rivers, lakes, springs, wells, pumps, cisterns, reservoirs, tanks, aqueducts, sluices, pipes, mains, valves, culverts, filters (mechanical or chemical), engines, machinery, lands, buildings and things for supplying or used for supplying or purifying water.¹³⁴ "Sewer" includes drains, sewage systems and systems of sewage disposal of every description including cesspools and septic tanks.¹³⁵

The Minister is further empowered to make such regulations as he deems necessary for the prevention, treatment, mitigation and suppression of disease and the conservation of human health and life,¹³⁶ and may provide for, and regulate: the inspection, construction, maintenance, cleansing, purifying and disinfection of all water supply systems and sewers, and the location of water closets or other

123. *Ibid.*, s. 7.

124. *Ibid.*, s. 8.

125. *Ibid.*, s. 9(2).

126. *Ibid.*, s. 10.

127. R.S.N.B., 1952, c. 65.

128. See p. 439 [See also Addendum, p. 497].

129. R.S.N.B., 1952, c. 102. [There is now a Minister of Health and a Minister of Welfare (see (1971), 20 Eliz. II, c. 31); the matters here dealt with relate to health].

130. *Ibid.*, s. 20(1).

131. *Ibid.*, s. 20(3).

132. *Ibid.*, s. 21(1).

133. *Ibid.*, s. 21(2).

134. *Ibid.*, s. 1(w).

135. *Ibid.*, s. 1(s).

136. *Ibid.*, s. 6(1).

things detrimental to public health;¹³⁷ the prevention of the pollution, defilement, discolouration or fouling of lakes, rivers, streams, pools, springs, wells and other waters, or waterworks, and the construction, maintenance and purification of water systems and water supplies, including the testing and analysis of water, the inspection and approval of the source of water supply and the treatment of such water by chemical or other means;¹³⁸ the fluoridation of water;¹³⁹ and the prevention, abatement and removal of nuisances,¹⁴⁰ which are broadly defined to include any condition that is or may be injurious or dangerous to health, or that prevents or hinders in any manner the suppression of disease,¹⁴¹ including a well, spring or other water supply.¹⁴²

Provincial Planning Board

The Provincial Planning Board was created by the Community Planning Act¹⁴³ and consists of not less than six and not more than sixteen members appointed by the Lieutenant-Governor in Council.¹⁴⁴ Its function is to coordinate planning at the provincial level. One of the members may be designated as chairman and another as vice-chairman by the Lieutenant-Governor in Council.¹⁴⁵ The Board may appoint an executive committee of not less than three and not more than five members¹⁴⁶ to exercise such powers as the Board may assign to it.¹⁴⁷

The function of the Board is relevant in this context insofar as plans for the use and development of water resources may be required to comply with overall plans for the co-ordination of community development. Among the more specific functions of the Board are those to promote community planning,¹⁴⁸ to develop programs for collecting information respecting flood prevention, forest preservation and land used for agricultural, mineral, factory, industrial and other purposes,¹⁴⁹ to recommend a program for the comprehensive economic and physical development of the province,¹⁵⁰ to promote action by municipal councils in establishing waste disposal facilities,¹⁵¹ and to recommend methods and procedures for the coordination of efforts of governmental departments in all aspects of community planning.¹⁵²

Subject to the approval of the Lieutenant-Governor in Council, the Provincial Planning Board is given power to define the boundaries of a planning district, consisting of two or more municipalities together with any other designated area¹⁵³ authorized under section 13 of the Act,¹⁵⁴ and, with the assent of the

137. *Ibid.*, s. 6(1)(c).

138. *Ibid.*, s. 6(1)(x).

139. *Ibid.*, s. 6(1)(xa), as enacted by (1965), 14 Eliz. II, c. 19, s. 1 (N.B.).

140. *Ibid.*, s. 6(1)(d).

141. *Ibid.*, s. 1(m).

142. *Ibid.*, s. 1(m)(v).

143. (1960-61), 9 & 10 Eliz. II, c. 6 (N.B.).

144. *Ibid.*, s. 63(1).

145. *Ibid.*, s. 63(3).

146. *Ibid.*, s. 64(1).

147. *Ibid.*, s. 64(2).

148. *Ibid.*, s. 65(a), as enacted by (1966), 15 Eliz. II, s. 152, s. 34(a) (N.B.).

149. *Ibid.*, s. 65(f).

150. *Ibid.*

151. *Ibid.*, s. 65(j), as amended by (1966), 15 Eliz. II, c. 152, s. 34(c) (N.B.).

152. *Ibid.*, s. 65(g), as enacted by (1966), 15 Eliz. II, c. 152, s. 34(d) (N.B.).

153. *Ibid.*, s. 66(1)(a), as enacted by (1966), 15 Eliz. II, c. 152, s. 35 (N.B.).

154. *Ibid.*, s. 13, as enacted by (1966), 15 Eliz. II, c. 152, s. 6 (N.B.).

Lieutenant-Governor in Council,¹⁵⁵ the Board may assume the duties and powers of a municipal council for any area within any planning district that is not included within a municipality.¹⁵⁶ These powers include the power to establish a planning commission for the area,¹⁵⁷ to adopt a community plan for the physical development and improvement of the area,¹⁵⁸ to divide the area into zoning districts for the regulation of development,¹⁵⁹ to enact building by-laws,¹⁶⁰ and to regulate the subdivision of land by by-law.¹⁶¹ The Board may further be ordered by the Minister of Municipal Affairs to supply community planning for a local service district¹⁶² established under the Municipalities Act,¹⁶³ which is a district outside the territorial limits of a municipality that is established by the Minister for the provision of services.¹⁶⁴ Where such an order is issued, the Board must hold public meetings of all residents of the local service district who are qualified to vote under the Schools Act for the purpose of electing a planning advisory committee,¹⁶⁵ whose function is to make recommendations to the Board with respect to regulations applying to that local service district.¹⁶⁶ The Board may, with the Minister's approval, by zoning regulations, divide any local service district into zoning districts¹⁶⁷ and provide for a zoning appeal board.¹⁶⁸ The Board is further empowered to make regulations, with the approval of the Lieutenant-Governor in Council, to apply, with limited exceptions, only outside cities, towns, village and areas in which zoning and subdivision by-laws have been passed.¹⁶⁹ These would relate to such matters as private sewage,¹⁷⁰ and would prohibit the erection of a building or structure on a site which is, in the opinion of the Board, marshy or subject to flooding.¹⁷¹ The Board may also make regulations, with the approval of the Lieutenant-Governor in Council, respecting any aspect of community planning in relation to any area, or part thereof (not included within municipal boundaries), designated under the Community Improvement Corporation Act.¹⁷² These would be based on recommendations from the Community Improvement Corporation,¹⁷³ or, in relation to an area designated by the Board, upon the approval of the Lieutenant-Governor in Council.¹⁷⁴ The Board may exercise further power, with the approval of the Lieutenant-Governor in Council,¹⁷⁵ to order a municipal council to prepare

155. *Ibid.*, s. 66(2), as enacted by (1966), 15 Eliz. II, c. 152, s. 35 (N.B.).

156. *Ibid.*, s. 66(1)(b), as enacted by (1966), 15 Eliz. II, c. 152, s. 35 (N.B.).

157. *Ibid.*, s. 5, as enacted by (1966), 15 Eliz. II, c. 152, s. 2 (N.B.).

158. *Ibid.*, s. 16(1).

159. *Ibid.*, s. 19.

160. *Ibid.*, s. 26, as enacted by (1966), 15 Eliz. II, c. 152, s. 14 (N.B.).

161. *Ibid.*, s. 27, as amended by (1965), 14 Eliz. II, c. 12, s. 2 (N.B.), (1966), 15 Eliz. II, c. 152, ss. 16, 17(c) (N.B.).

162. *Ibid.*, s. 66(3), as enacted by (1966), 15 Eliz. II, c. 152, s. 35 (N.B.).

163. (1966), 15 Eliz. II, c. 20, s. 24 (N.B.).

164. *Ibid.*

165. (1960-61), 9 & 10 Eliz. II, c. 6, s. 66(4), as enacted by (1966), 15 Eliz. II, c. 152, s. 35 (N.B.).

166. *Ibid.*, s. 66(5), as enacted by (1966), 15 Eliz. II, c. 152, s. 35 (N.B.).

167. *Ibid.*, s. 66(6), as enacted by (1966), 15 Eliz. II, c. 152, s. 35 (N.B.).

168. *Ibid.*, s. 66(9)-(12), as enacted by (1966), 15 Eliz. II, c. 152, s. 35 (N.B.).

169. *Ibid.*, s. 67(14), as enacted by (1966), 15 Eliz. II, c. 152, s. 36 (N.B.).

170. *Ibid.*, s. 67(2)(g), as enacted by (1966), 15 Eliz. II, c. 152, s. 36 (N.B.).

171. *Ibid.*, s. 67(2)(k), as enacted by (1966), 15 Eliz. II, s. 152, s. 36 (N.B.).

172. *Ibid.*, s. 67B(1)(a), as enacted by (1966), 15 Eliz. II, c. 152, s. 38 (N.B.).

173. *Ibid.*, s. 67B(2), as enacted by (1966), 15 Eliz. II, c. 152, s. 38 (N.B.).

174. *Ibid.*, s. 67B(1)(b), as enacted by (1966), 15 Eliz. II, c. 152, s. 38 (N.B.).

175. *Ibid.*, s. 68(1).

and adopt a community plan or zoning by-law as long as the Board is satisfied that it is in the public interest to do so.¹⁷⁶ And where the Board is satisfied that a council is not conforming to its community plan or is not enforcing its plan or a zoning or subdivision by-law, it may order the council to do so,¹⁷⁷ in lieu of which, after notice in the Royal Gazette, the Board may exercise the powers of a council under the Act.¹⁷⁸

Community Improvement Corporation

The Community Improvement Corporation is constituted by virtue of the Community Improvement Corporation Act,¹⁷⁹ and has as directors the Deputy Ministers of Agriculture and Rural Development, Natural Resources, and Municipal Affairs, the General Manager of the New Brunswick Electric Power Commission, the Economic Advisor to the Government, and such other persons as the Lieutenant-Governor in Council may appoint.¹⁸⁰ The Corporation has the general capacities of a corporation under the Corporations Act,¹⁸¹ in addition to powers which the Lieutenant-Governor in Council may vest in it in order to carry out the terms of agreements entered into with the federal government,¹⁸² The Corporation may make and administer regulations, to be approved by the Lieutenant-Governor in Council, respecting the more efficient use and economic development of land in the province,¹⁸³ and has power in any area of the province designated by the Lieutenant-Governor in Council to prepare plans for regional development,¹⁸⁴ to coordinate and guide orderly economic development,¹⁸⁵ and to develop recreational and tourist parks and facilities.¹⁸⁶ These objects are clearly broad enough to affect water resources. The Lieutenant-Governor in Council is empowered by the Act to designate any area of the province for the attainment of the more efficient use and economic development of land,¹⁸⁷ to approve regulations recommended by the Corporation,¹⁸⁸ to approve agreements conducive to the attainment of any of the objects and purposes of the Corporation¹⁸⁹ and to make regulations for the better administration of the Act.¹⁹⁰

New Brunswick Development Corporation

The New Brunswick Development Corporation was created by An Act to Incorporate The New Brunswick Development Corporation,¹⁹¹ and consists of up to eleven directors, all of whom are appointed by the Lieutenant-Governor in Council¹⁹² with the exception of the Minister of Finance, who is a director

176. *Ibid.*, s. 68(2), as enacted by (1966), 15 Eliz. II, c. 152, s. 40 (N.B.).

177. *Ibid.*, s. 68(3), as enacted by (1966), 15 Eliz. II, c. 152, s. 40 (N.B.).

178. *Ibid.*, s. 68(4), as enacted by (1966), 15 Eliz. II, c. 152, s. 40 (N.B.).

179. (1965) 14 Eliz. II, c. 2 (N.B.).

180. *Ibid.*, s. 2.

181. *Ibid.*, s. 4(1).

182. *Ibid.*, s. 4(2), as enacted by (1969), 18 Eliz. II, c. 24, s. 1 (N.B.).

183. *Ibid.*, s. 5(1)(a), as enacted by (1969), 18 Eliz. II, c. 24, s. 2 (N.B.).

184. *Ibid.*, s. 5(1)(b)(i).

185. *Ibid.*, s. 5(1)(b)(ii).

186. *Ibid.*, s. 5(1)(b)(xi).

187. *Ibid.*, s. 9(a).

188. *Ibid.*, s. 9(b).

189. *Ibid.*, s. 9(c).

190. *Ibid.*, s. 9(d).

191. (1959), 8 Eliz. II, c. 9 (N.B.).

192. *Ibid.*, ss. 2(1), (3).

ex officio.¹⁹³ The Corporation may exercise general corporate powers,¹⁹⁴ some of which require the prior approval of the Lieutenant-Governor in Council.¹⁹⁵ Among the general functions of the Corporation is the duty to assist, promote, encourage and advance the industrial development, prosperity and economic welfare of the province,¹⁹⁶ to encourage and assist in locating new business and industry in the province,¹⁹⁷ and to co-operate with other organizations public or private, the objects of which are the promotion and advancement of industrial development.¹⁹⁸

Research and Productivity Council

The Research and Productivity Council consists of not less than eight, and not more than thirteen members appointed by the Lieutenant-Governor in Council, and chosen from the fields of industry and commerce, organized labor, government and higher education.¹⁹⁹ The objects of the Council are to promote, stimulate and expedite continuing improvement in productive efficiency and expansion in the various sectors of the New Brunswick economy,²⁰⁰ to assist, encourage, and where necessary conduct, research, studies and investigations in the field of industrial and scientific technology related to, among other matters, the conservation, development and utilization of the natural resources of the province,²⁰¹ which would include water resources and, in this regard, to co-operate and act in conjunction with other organizations and agencies, public and private.²⁰²

Municipal Capital Borrowing Board

The Municipal Capital Borrowing Board exists by virtue of the Municipal Capital Borrowing Act,²⁰³ and consists of not less than three and not more than five members appointed by the Lieutenant-Governor in Council,²⁰⁴ under the direction of the Minister of Municipal Affairs.²⁰⁵ Municipalities (which is broadly defined to include cities, towns, villages and local improvement districts,²⁰⁶ among other entities), other than the City of Saint John,²⁰⁷ must apply to the Board before obtaining money for a capital expense either by way of loan or by the issue of debentures, or before guaranteeing the repayment of any loan or issue of debentures made for a capital expense.²⁰⁸ The financing of water and sewage installations would be affected by the powers given the Board.²⁰⁹

193. *Ibid.*, s. 2(2).

194. *Ibid.*, s. 4, s. 3(2A), as enacted by (1967), 16 Eliz. II, c. 57, s. 1 (N.B.).

195. *Ibid.*, s. 3(3), as enacted by (1967), 16 Eliz. II, c. 57, s. 2 (N.B.).

196. *Ibid.*, s. 3(1)(a).

197. *Ibid.*, s. 3(1)(b).

198. *Ibid.*, s. 3(1)(c).

199. Research and Productivity Council Act, (1961-2), 10 & 11 Eliz. II, c. 46, s. 3 (N.B.).

200. *Ibid.*, s. 10.

201. *Ibid.*, s. 10(a)(i).

202. *Ibid.*, s. 10(c).

203. (1963, 2nd Sess.), 12 Eliz. II, c. 8 (N.B.).

204. *Ibid.*, s. 2(1).

205. *Ibid.*, s. 2A, as enacted by (1964), 13 Eliz. II, c. 44, s. 1 (N.B.).

206. *Ibid.*, s. 1(h).

207. *Ibid.*, s. 4(2).

208. *Ibid.*, s. 4(1).

209. See, for example, *ibid.*, s. 10, as enacted by (1969), 18 Eliz. II, c. 57, s. 4 (N.B.).

General Expropriation Powers

Power to expropriate property in New Brunswick derives from varied statutory sources, including public Acts relating to highways and public works, public and private Acts relating to municipal government, and private Acts relating to industrial development. Reference to these powers has been made from time to time in the course of discussing particular statutory provisions, and the full scope of expropriation power can only be determined by examining each statute creating a particular power.

Discussion will be limited here to two important New Brunswick statutes, the Expropriation Act²¹⁰ and the Land Compensation Board Act.²¹¹

The Expropriation Act empowers the Lieutenant-Governor in Council to purchase or expropriate any land that may be deemed necessary or desirable for the carrying out of any public work or enterprise, or other public purpose, or for the carrying out of any work or enterprise deemed to be in the public interest.²¹² "Public work" is defined as including dams, harbours, piers, works for improving the navigation of any water, slides, dams, piers, booms and other works for facilitating the transmission of timber, and all other property belonging to the province, and also works, properties and undertakings acquired at the expense of the province, or for the acquisition or construction of which public monies are voted and appropriated by the legislature otherwise than by way of subsidy.²¹³

For the purpose of ascertaining the desirability of expropriating land, the Minister, by himself, his agents, engineers and workmen may enter upon land to survey, take levels and make borings.²¹⁴ Provision is made that the Minister must compensate the owner for damage inflicted in the exercise of this power.²¹⁵ Where the Minister is resisted in exercising these powers he may apply *ex parte* to a judge of the Supreme Court to assist him to exercise them.²¹⁶

To expropriate land the Lieutenant-Governor in Council may issue an order in council describing the land to be expropriated, which must be recorded in the appropriate registry office together with a plan conforming with the requirements of the Registry Act.²¹⁷ Notice and publication requirements for the order and its recording are prescribed. Upon the recording of the order, title to the land vests in the Crown in the right of the province and the Crown may immediately enter into possession.²¹⁸

Where land is expropriated under the Act, and the Minister in charge of the department on behalf of which the expropriation is being carried out and the owner fail to agree upon the amount of the compensation, the Minister is required within one year from the date of expropriation to have served on the owner of the land, by registered mail, a notice setting forth the amount the Minister is prepared to pay for compensation, describing the land and the date and particulars of the

210. R.S.N.B., 1952 c. 77.

211. (1964) 13 Eliz. II, c. 6 (N.B.).

212. R.S.N.B., 1952, c. 77, s. 2(1).

213. *Ibid.*, s. 1(e), as enacted by (1961-62), 10 & 11 Eliz. II, c. 55, s. 1 (N.B.).

214. *Ibid.*, s. 4(1), as enacted by (1967), 16 Eliz. II, c. 39, s. 2 (N.B.).

215. *Ibid.*, s. 4(2), as enacted by (1967), 16 Eliz. II, c. 39, s. 2 (N.B.).

216. *Ibid.*, s. 4B, as enacted by (1967), 16 Eliz. II, c. 39, s. 3 (N.B.).

217. *Ibid.*, ss. 3(a), (b).

218. *Ibid.*, s. 3(c), as amended by (1957), 6 Eliz. II, c. 39, s. 1 (N.B.).

expropriating order in council, and specifying that the owner must file with the Minister within ninety days from the date of this notice, a written claim, setting forth the amount claimed for compensation and the owner's right and title to it.²¹⁹ Special provision is also made for situations where the owner is absent from the province or is unknown.²²⁰

Within ninety days from the date of the Minister's notice, the owner must file a written claim setting forth the amount claimed for compensation and his right and title to it. Where an owner fails to do so, he is deemed to have accepted the amount of compensation offered by the Minister,²²¹ and the Minister may, at any time after the expiration of one year from the date of his notice to the owner, apply to a judge of the Supreme Court for an order for payment into court of the amount of compensation offered in that notice.²²² Upon such amount being paid into court, the Minister and the province are relieved from further liability for compensation.²²³ Where a compensation claim is not filed within the prescribed period and in the manner provided for, it is barred unless the Supreme Court, upon application by the owner not later than one year from the date of the Minister's notice, and upon the showing of good cause, allows the claim to be made upon such terms as to notice, costs or otherwise as it shall direct.²²⁴

Where the owner does, however, comply with the requirements of the Act, and a dispute exists as to compensation, the owner may, or the Minister must, refer the matter to the Land Compensation Board.²²⁵ This Board, constituted under the Land Compensation Board Act,²²⁶ consists of a chairman and such additional members as determined and appointed by the Lieutenant-Governor in Council.²²⁷ The Board has authority to hear and determine all questions of law or fact with regard to matters within its jurisdiction²²⁸ and has exclusive jurisdiction respecting all matters in which jurisdiction has been conferred on it by this Act or any other Act,²²⁹ for example the Expropriation Act. Among the matters conferred on the Board is the jurisdiction and power to hear and determine all applications made, proceedings instituted and matters referred to or brought before it under this Act or any other public or private Act,²³⁰ and to make such orders, rules and regulations, give such directions, issue such certificates and do such other things as may be necessary or incidental to the exercise of its powers,²³¹ and to perform such other functions as are conferred upon or assigned to the Board by statute or under statutory authority.²³²

The Act stipulates that, notwithstanding anything in any public or private Act, the amount of compensation or damages payable where land or other prop-

219. *Ibid.*, s. 5(1), as enacted by (1969), 18 Eliz. II, c. 30, s. 3 (N.B.).

220. *Ibid.*, s. 5(2), as enacted by (1961-2), 10 & 11 Eliz. II, c. 55, s. 3 (N.B.).

221. *Ibid.*, s. 6(2), as enacted by (1961-2), 10 & 11 Eliz. II, c. 55, s. 3 (N.B.).

222. *Ibid.*

223. *Ibid.*

224. *Ibid.*, s. 6(3), as enacted by (1961-2), 10 & 11 Eliz. II, c. 55 s. 3 (N.B.).

225. *Ibid.*, s. 7, as enacted by (1969), 18 Eliz. II, c. 30, s. 4 (N.B.).

226. (1964), 13 Eliz. II, c. 6 (N.B.).

227. *Ibid.*, s. 3.

228. *Ibid.*, s. 20.

229. *Ibid.*, s. 21.

230. *Ibid.*, s. 22(a).

231. *Ibid.*

232. *Ibid.*, s. 22(b).

erty has been expropriated under any public or private Act, unless agreed upon by the parties, is to be referred to the Board,²³³ and the amount of any monetary claim as between Crown and subject, which by the terms of such Act is to be determined by arbitration, is now to be referred to the Board.²³⁴ However, the Board is not to have jurisdiction in any arbitration under the City of Saint John Urban Renewal Expropriation Act except with the consent of the parties.²³⁵ The Board, in exercising its jurisdiction and powers, and, generally, for the purpose of carrying into effect the provisions of this or any other public or private Act, has all the powers, rights and privileges vested in the Supreme Court with respect to procedural matters.²³⁶

In assessing a claim, the Board is to appraise and determine the fair value of the land at the date of the recording of the order in council describing the land.²³⁷ The Board is also to consider the advantages and disadvantages of the public work with respect to the land of any person through which it passes, or to which it is contiguous or, as regards a claim for compensation, for damages occasioned by it.²³⁸ In assessing the value of any property taken or the amount of damages, the Board is to take into consideration advantages accrued or likely to accrue to such person or his estate, as well as the injury or damages occasioned by the public work.²³⁹

Compensation agreed upon or awarded by the Board for any land or property acquired or taken is to stand in the place of that land or property, and any claim to or incumbrance on that land or property is, as respects Her Majesty, converted into a claim to the compensation, or to a proportionate amount thereof, and is void as to the property.²⁴⁰ Through expropriation the property becomes vested in the Crown, subject, however, to the determination and payment of the compensation.²⁴¹

A certified copy of any order, decision or award of the Board may be filed in the office of the Registrar of the Supreme Court, and thereupon becomes, and is enforceable as, a judgment or order of the Supreme Court.²⁴² An appeal lies to the Court of Appeal, notwithstanding any public or private Act, from any order, decision or award of the Board, provided notice of such appeal is given to the opposite party within thirty days after the making of the order or decision sought to be appealed from.²⁴³ The Rules of the Supreme Court respecting appeals from the Queen's Bench Division apply *mutatis mutandis* to such an appeal.²⁴⁴

233. *Ibid.*, s. 23(1)(a).

234. *Ibid.*, s. 23(1)(b).

235. *Ibid.*, s. 23(2)(a).

236. *Ibid.*, s. 25.

237. Expropriation Act, R.S.N.B., 1952, c. 77, s. 11, as enacted by (1969), 18 Eliz. II, c. 30, s. 5 (N.B.).

238. *Ibid.*, s. 12, as enacted by (1967), 16 Eliz. II, c. 39, s. 7 (N.B.).

239. *Ibid.*

240. *Ibid.*, s. 17, as enacted by (1967), 16 Eliz. II, c. 39, s. 11 (N.B.).

241. *Ibid.*

242. Land Compensation Board Act, (1964), 13 Eliz. II, c. 6, s. 30 (N.B.).

243. *Ibid.*, s. 31(1), as enacted by (1969), 18 Eliz. II, c. 46, s. 2 (N.B.).

244. *Ibid.*, s. 31(2), as enacted by (1969), 18 Eliz. II, c. 46, s. 2 (N.B.).

MUNICIPAL STRUCTURE

General

The municipal structure in New Brunswick has its foundation in the Municipalities Act,²⁴⁵ enacted in 1966. This Act provides for the continuation of existing municipal organizations and the creation of new ones, the conferring of standardized powers and the imposition of uniform responsibilities; it is administered by the Minister of Municipal Affairs.²⁴⁶

Under the Act, the inhabitants of cities and towns²⁴⁷ (but not villages)²⁴⁸ in existence at the coming into force of the Act, remain as bodies corporate, and the territorial limits of existing cities and towns remain the same until altered in accordance with the Act.²⁴⁹ The Lieutenant-Governor in Council is empowered, as well, upon the recommendation of the Minister, and after the study of a feasibility report, to incorporate the inhabitants of any area as a municipality.²⁵⁰ The Act further provides that a municipal council may petition the Minister for the institution of amalgamation proceedings for the amalgamation of two or more municipalities,²⁵¹ for the institution of annexation proceedings for a contiguous area,²⁵² for both,²⁵³ or for decrement proceedings.²⁵⁴ Upon the recommendation of the Minister, and after the study of a feasibility report, the Lieutenant-Governor in Council may amalgamate or annex, or do both, or may decrease the territorial limits of a municipality, as the case may be.²⁵⁵ In addition, provision is made for the incorporation by the Lieutenant-Governor in Council of villages of more than 1,000 in population as towns,²⁵⁶ and towns of more than 10,000 as cities.²⁵⁷

Municipalities, through their councils,²⁵⁸ may exercise the powers set out in the Act or in regulations authorized by the Act,²⁵⁹ and, in the case of pre-existing municipal corporations, may exercise powers under any charter or private or special Act still in force, except in so far as a provision of such an Act or charter is inconsistent with or conflicts with a provision of the Municipalities Act.²⁶⁰ Among the powers exercisable by a city or town under the Act is the power to provide any service deemed by the council to be expedient for the peace, order and good government of the municipality and for promoting the health, safety and welfare of the inhabitants, including, more particularly, such matters as drainage, sewage, water, community services and recreational facilities,²⁶¹ water and sewage services to be supplied on a user charge basis.²⁶² A municipality may further exercise powers

245. (1966), 15 Eliz. II, c. 20 (N.B.). [See also Addendum, p. 497].

246. *Ibid.*, ss. 1(b), 2.

247. *Ibid.*, s. 3(1).

248. *Ibid.*, s. 23(2).

249. *Ibid.*, s. 3(2).

250. *Ibid.*, s. 15(1), as amended by (1967), 16 Eliz. II, c. 56, s. 3 (N.B.).

251. *Ibid.*, s. 15(2)(a), as enacted by (1969), 18 Eliz. II, c. 58, s. 1 (N.B.).

252. *Ibid.*, s. 15(2)(b), as enacted by (1969), 18 Eliz. II, c. 58, s. 1 (N.B.).

253. *Ibid.*, s. 15(2)(c), as enacted by (1969), 18 Eliz. II, c. 58, s. 1 (N.B.).

254. *Ibid.*, s. 15(2)(d), as enacted by (1969), 18 Eliz. II, c. 58, s. 1 (N.B.).

255. *Ibid.*, s. 15(4), as enacted by (1969), 18 Eliz. II, c. 58, s. 2 (N.B.).

256. *Ibid.*, s. 16.

257. *Ibid.*, s. 17.

258. *Ibid.*, s. 9(1).

259. *Ibid.*, s. 14(2).

260. *Ibid.*, s. 14(1).

261. *Ibid.*, s. 7(1), First Schedule.

262. *Ibid.*, s. 188, as enacted by (1968), 17 Eliz. II, c. 41, s. 42 (N.B.).

of expropriation for carrying out any of its purposes, whether the land expropriated lies within or without the boundaries of the municipality,²⁶³ as long as it does not lie in another municipality.²⁶⁴

The Act empowers municipalities to make by-laws relating to various matters of a municipal nature. By-laws that were already in force in existing towns and cities are continued in effect by the Act until their repeal by the council,²⁶⁵ as long as there is no conflict between a by-law and the Act.²⁶⁶ Similarly, the incorporation of a village as a town, or a town as a city, will not affect the by-laws in force at that time until repeal,²⁶⁷ nor will the amalgamation of two municipalities affect the by-laws in force in either at the time of amalgamation;²⁶⁸ however, the annexation of an area to a municipality results in the extension of the municipal by-laws to that area.²⁶⁹

The Act also provides for the establishment of local service districts in areas lying outside the territorial limits of a municipality, upon the petition of twenty-five residents of the area qualified to vote under the Schools Act.²⁷⁰ The purpose of establishing such a district is to provide, in that district, services which a municipality is authorized to provide under the Act. Where such a district is established, the Minister must provide the service approved,²⁷¹ and raise the necessary money by taxation within the local service district in accordance with the Real Property Tax Act.²⁷²

The Act further provides that where a municipality is authorized to provide for sewage and water within its territorial limits, it may undertake the provision of such services as a local improvement,²⁷³ and a council may authorize, as a local improvement, such matters as constructing, deepening, enlarging, extending or making connections with a surface sewer, domestic sewer, sewage works, water main or water system,²⁷⁴ which terms include sewers intended to carry domestic, commercial or industrial sewage,²⁷⁵ facilities for collecting, pumping, treating and disposing of sewage,²⁷⁶ sewers intended to carry storm and surface water and drainage, surface drains,²⁷⁷ and all facilities for storing, pumping, treating and distributing water for domestic, commercial, industrial and fire protection purposes.²⁷⁸ Such work may be undertaken on the petition of persons affected in the area,²⁷⁹ or on the council's initiative²⁸⁰ (in the absence of a petition by residents protesting the work)²⁸¹ or by the council pursuant to a direction from the Minister

263. *Ibid.*, s. 8(1).

264. *Ibid.*, s. 8(2).

265. *Ibid.*, s. 196(1).

266. *Ibid.*, s. 196(2).

267. *Ibid.*, s. 21(1), as amended by (1967), 16 Eliz. II, c. 56, s. 6 (N.B.).

268. *Ibid.*, s. 21(2), as amended by (1967), 16 Eliz. II, c. 56, s. 6 (N.B.).

269. *Ibid.*, s. 21(3), as amended by (1967), 16 Eliz. II, c. 56, s. 6 (N.B.).

270. *Ibid.*, s. 25(1).

271. *Ibid.*, s. 27.

272. *Ibid.*, s. 28.

273. *Ibid.*, s. 117.

274. *Ibid.*, s. 119(1)(d).

275. *Ibid.*, s. 118(d).

276. *Ibid.*, s. 118(i).

277. *Ibid.*, s. 118(k).

278. *Ibid.*, s. 118(n).

279. *Ibid.*, s. 122.

280. *Ibid.*, s. 123(1).

281. *Ibid.*, ss. 123(3), (4); but see s. 124 authorizing the council to proceed, under certain circum-

of Health and Welfare authorized by the Health Act.²⁸² The cost of the local improvement is met in accordance with special provisions in the Act.²⁸³

Municipal Councils are required under the Community Planning Act²⁸⁴ to establish planning commissions²⁸⁵ to study the physical, social, economic and other conditions affecting the planning of municipalities, to advise councils on such matters, and to submit recommendations for by-laws.²⁸⁶ Further provision is made for the establishment of planning districts by order of the Lieutenant-Governor in Council,²⁸⁷ and for the enactment of complementary by-laws relating to planning by two or more councils²⁸⁸ and for the establishment of district planning commissions.²⁸⁹ Municipal councils may by by-law adopt a community plan for the physical development and improvement of the municipality relating, among other matters, to the manner in which land in the municipality should be used or developed,²⁹⁰ the allocation of areas of land for residential, business, industrial or any other use,²⁹¹ the renewal or redevelopment of any part of the municipality²⁹² and the programming of development to be carried out by the council.²⁹³ Councils may further enact zoning²⁹⁴ and building²⁹⁵ by-laws and are required to enact subdivision by-laws regulating the subdivision of land within the municipality.²⁹⁶ Where a municipality has established a planning commission, and has enacted a subdivision by-law,²⁹⁷ all transactions that purport to divide a piece of land into two or more parcels, with enumerated exceptions, are ineffective until a plan is approved and filed in accordance with the Act.²⁹⁸ Approval may, in accordance with a by-law, be refused until the owner of the land has made satisfactory arrangements to assist in installing such matters as drainage ditches, water and sewage lines and other facilities deemed necessary by the council.²⁹⁹

Cities

General

New Brunswick has six cities: Saint John, Fredericton, Moncton, Edmundston, Bathurst and Campbellton, all of which are authorized to utilize water resources for public services and to expropriate lands for these purposes.

stances, notwithstanding a petition against proceeding.

282. *Ibid.*, s. 125.

283. *Ibid.*, ss. 127-147.

284. (1960-61), 9 & 10 Eliz. II, c. 6 (N.B.).

285. *Ibid.*, s. 5, as enacted by (1966), 15 Eliz. II, c. 152, s. 2 (N.B.).

286. *Ibid.*, s. 7(1).

287. *Ibid.*, s. 13(2)(a), as enacted by 1966, 15 Eliz. II, c. 152, s. 6 (N.B.).

288. *Ibid.*, s. 13(1)(a), as enacted by (1966), 15 Eliz. II, c. 152, s. 6 (N.B.).

289. *Ibid.*, s. 13(2)(b), as enacted by (1966), 15 Eliz. II, c. 152, s. 6 (N.B.).

290. *Ibid.*, s. 16(1)(a).

291. *Ibid.*, s. 16(1)(b).

292. *Ibid.*, s. 16(1)(d).

293. *Ibid.*, s. 16(1)(e).

294. *Ibid.*, s. 19.

295. *Ibid.*, s. 26, as enacted by (1966), 15 Eliz. II, c. 152, s. 14 (N.B.).

296. *Ibid.*, s. 27(1), as amended by (1966), 15 Eliz. II, c. 152, ss. 16, 17(c) (N.B.).

297. *Ibid.*, s. 28(5), as enacted by (1963), 2nd Sess.), 12 Eliz. II, c. 13, s. 8, as amended by (1966), 15 Eliz. II, c. 152, s. 17(a) (N.B.).

298. *Ibid.*, s. 28(2), as enacted by (1963, 2nd Sess.), 12 Eliz. II, c. 13, s. 8, as amended by (1966), 15 Eliz. II, c. 152, s. 17(a) (N.B.).

299. *Ibid.*, s. 27(1) (j)(ii), as enacted by (1966), 15 Eliz. II, c. 152, s. 16, as amended by (1966), 15 Eliz. II, c. 152, s. 17(c) (N.B.).

Fredericton

The City of Fredericton was authorized to construct and operate a system of sewage and water supply in 1882,³⁰⁰ to take the water of the Saint John River from any point opposite the city or the Parish of Kingsclear or the water or any lake or stream situate in the city or in the parishes of St. Marys, Douglas, New Maryland, or Kingsclear in York County, or in the Parish of Maugerville in Sunbury County, and the waters flowing into and from the same and any ponds and streams, and any water rights connected therewith,³⁰¹ and to expropriate land for these purposes;³⁰² these powers were subsequently extended by legislation empowering the city to extend its water and sewage limits by by-law,³⁰³ to establish a water purification system,³⁰⁴ and to continue its practice of discharging sewage into the Saint John River.³⁰⁵ Such discharge could be prohibited by order in council of the Lieutenant-Governor in Council at any date after June, 1909, upon one year's notice to enable the city to provide septic tanks and filtration beds.³⁰⁶ In this regard, the Lieutenant-Governor in Council was required to cause bacteriological and chemical tests of the water of the river below Fredericton to be made from time to time to ascertain the effect of such discharge.³⁰⁷ Further, by virtue of the Fredericton City Charter,³⁰⁸ the city is empowered to enact by-laws: regulating and controlling the use of wells, springs and other sources of water for the city, making provision for a supply of water for the city, regulating the use of and the rate to be paid for water and preventing the contamination of any source of water or of any stream flowing through or past the city;³⁰⁹ pertaining to the building, erecting, buying or leasing, controlling and operation of any waterworks plant;³¹⁰ preventing nuisances;³¹¹ altering and extending the line of the water limits of the city;³¹² regulating bathing and washing in public waters;³¹³ regulating wharves, piers and docks on the Saint John River and preventing the filling up or encumbering of the Saint John River.³¹⁴ In order to carry out any of its powers, the city may expropriate lands and buildings.³¹⁵

Moncton

The City of Moncton was authorized to purchase and take over the waterworks system of the Moncton Gas, Light & Water Company in 1893, to provide the city with a sufficient supply of water for domestic, fire and other purposes and to exercise powers of expropriation related to these purposes.³¹⁶ Under the City of

300. (1882), 45 Vict., c. 66 (N.B.).

301. *Ibid.*, s. 1.

302. *Ibid.*

303. (1903), 3 Edw. VII, c. 50 (N.B.).

304. (1906), 6 Edw. VII, c. 38 (N.B.).

305. (1907), 7 Edw. VII, c. 83 (N.B.).

306. *Ibid.*, s.2.

307. *Ibid.*, s. 3.

308. (1951), 15 Geo. VI, c. 69 (N.B.).

309. *Ibid.*, s. 227(1).

310. *Ibid.*, s. 227(54).

311. *Ibid.*, s. 227(65).

312. *Ibid.*, s. 227(107).

313. *Ibid.*, s. 227(5).

314. *Ibid.*, s. 227(116).

315. *Ibid.*, ss. 245-249A.

316. (1893), 56 Vict., c. 45 (N.B.).

Moncton Incorporation Act, 1946,³¹⁷ the city is given power to make by-laws: to abate public nuisances;³¹⁸ to erect, preserve and regulate public cisterns, reservoirs, pumps, wells and other conveniences for the supply of water;³¹⁹ to establish, make and regulate public fountains, and to prevent the waste and fouling of public water;³²⁰ it is further authorized to establish and regulate sewage facilities.³²¹ Other provisions relate to the regulation and supervision of the city water supply system.³²²

In 1964, the Greater Moncton Water Commission was established,³²³ composed of nine persons appointed in accordance with the Act.³²⁴ The Commission has power to acquire, operate, manage and control such waterworks and sewage works and undertakings as the Commission may require in any part of the counties of Westmorland, Albert, Kings or Kent, and to acquire and assume the assets and liabilities connected with such works,³²⁵ to acquire such rights and privileges, including lands, watercourses, watersheds, easements, buildings, erections, machinery, plants, works, equipment and appliances, as the Commission may deem necessary or convenient for its business,³²⁶ to set rates (subject to the Public Utilities Act) for the sale of water,³²⁷ to establish and construct (subject to the provisions of the Water Act) water and sewage works and to extend or alter existing works owned or operated by the Commission.³²⁸ The Commission is empowered to expropriate (with the consent of the Lieutenant-Governor in Council, and in accordance with the terms of the Act) lands, buildings and other structures,³²⁹ and existing waterworks and sewage works for the purpose of supplying water, a water system, sewers or a sewage system³³⁰ (as long as a public necessity exists). It may make and carry out any agreement to purchase or otherwise obtain a supply of electric power and energy, or water for the use of such works, lines, system, plant, apparatus and equipment as the Commission may require.³³¹ The Commission must submit an annual statement to the councils of the municipalities to which it is supplying its services, as well as to the Minister of Municipal Affairs.³³² The City of Moncton, the Town of Dieppe,³³³ or any municipality to which the Commission is giving its service may enter into an agreement with the Commission for the purposes set out in the Act and may sell, lease, transfer or otherwise dispose of all or any part of its water or sewage works to the Commission.³³⁴ The Commission

317. (1946), 10 Geo. VI, c. 101 (N.B.).

318. *Ibid.*, s. 62(14).

319. *Ibid.*, s. 62(19).

320. *Ibid.*, s. 62(20).

321. *Ibid.*, ss. 70-76.

322. *Ibid.*, ss. 203-223.

323. (1964), 13 Eliz. II, c. 77, s. 3(1) (N.B.).

324. *Ibid.*, as enacted by (1967), 16 Eliz. II, c. 76, s. 1 (N.B.).

325. *Ibid.*, s. 11(a).

326. *Ibid.*, s. 11(d).

327. *Ibid.*, s. 11(e).

328. *Ibid.*, s. 11(ee), as enacted by (1967), 16 Eliz. II, c. 76, s. 6 (N.B.).

329. *Ibid.*, s. 14.

330. *Ibid.*, s. 22.

331. *Ibid.*, s. 23.

332. *Ibid.*, s. 25, as enacted by (1967), 16 Eliz. II, c. 76, s. 9 (N.B.).

333. See also (1964), 13 Eliz. II, c. 70 (N.B.).

334. *Ibid.*, s. 27, as enacted by (1967), 16 Eliz. II, c. 76, s. 10 (N.B.).

is further empowered to provide its services as a local improvement in accordance with the provisions respecting local improvements set out in the Municipalities Act.³³⁵

Bathurst

The City of Bathurst was originally incorporated under the Towns Incorporation Act³³⁶ with power to exercise those powers relating to the supply and regulation of water supply conferred by that Act.³³⁷ In addition, by private Act, authority was granted to expropriate property for water and sewage purposes.³³⁸ In 1965 the Town of Bathurst became the City of Bathurst under the Bathurst City Charter.³³⁹ However, the city is not deemed to be a new corporation; nor are its former powers deemed to be altered or its by-laws repealed,³⁴⁰ except as expressly repealed or affected by the charter.³⁴¹ Under the charter, the city is empowered to construct, build, purchase, lease, drill, explore for, improve, extend, hold, maintain, control, operate and conduct water systems and sewage systems,³⁴² and, in so doing, may enter upon or purchase lands and buildings as are necessary,³⁴³ and may make by-laws providing for the general conduct of any water or sewage system, may fix and collect rates,³⁴⁴ and may further exercise powers of expropriation in carrying out any power or authority in relation to water and sewage services conferred by the Act.³⁴⁵

Edmundston

The City of Edmundston was originally the Town of Edmundston, incorporated under the Towns Incorporation Act³⁴⁶ in 1905. By private Act in the same year,³⁴⁷ authority was conferred upon the town to acquire, construct and provide a system of waterworks, to acquire the works and franchises of any water company, to take lands and waters within a ten mile radius of the town and to regulate the use of the water so supplied. In 1952,³⁴⁸ Edmundston was incorporated as a city, but it continued as the municipal corporation already established,³⁴⁹ and was given power to make by-laws: regulating and controlling the use of wells, springs, and other sources of supply of water for the city, making provision for a supply of water for the city, regulating its use and preventing the contamination of any source of supply of water or of any stream flowing through or past the city,³⁵⁰ for the construction and maintenance of sewers;³⁵¹ and for the abatement of nuisances.³⁵²

335. *Ibid.*, s. 29(2), as enacted by (1967), 16 Eliz. II, c. 76, s. 11 (N.B.).

336. Under C.S.N.B., 1903, c. 166, in 1912.

337. See also (1951), 15 Geo. VI, c. 52 (N.B.).

338. (1943), 7 Geo. VI, c. 46 (N.B.).

339. (1965), 14 Eliz. II, c. 52 (N.B.).

340. *Ibid.*, s. 471.

341. *Ibid.*, s. 3.

342. *Ibid.*, s. 427.

343. *Ibid.*, s. 430.

344. *Ibid.*, s. 432.

345. *Ibid.*, ss. 440, 136-141.

346. C.S.N.B., 1903, c. 166.

347. (1905), 5, Edw. VII, c. 73 (N.B.).

348. (1952), 1 Eliz. II, c. 49 (N.B.).

349. *Ibid.*, s. 2.

350. *Ibid.*, s. 72(115).

351. *Ibid.*, s. 72(89).

352. *Ibid.*, s. 72(61).

In exercising such powers, the council was authorized to expropriate land within the city.³⁵³ The city has subsequently been empowered to enter upon or use any land within the limits of the city, or in the County of Madawaska, within ten miles of the city limits, to drill and explore for a water supply, to survey and ascertain what lands may be required for the purpose of a water supply system, and to purchase or lease such lands and erect and operate reservoirs, waterworks, wells, dams, buildings, machinery and any other construction necessary for a water system.³⁵⁴ Powers of expropriation are conferred for the purpose of carrying out any power or authority under the Act.³⁵⁵

Campbellton

The City of Campbellton was originally incorporated in 1888 as the Town of Campbellton³⁵⁶ with power to make by-laws: relating to public water supply;³⁵⁷ regulating bathing;³⁵⁸ abating public nuisances;³⁵⁹ and regulating wharves, piers and docks.³⁶⁰ Under a further Act of the legislature in 1891, the town was authorized to construct and provide a system of waterworks and sewage works and docks.³⁶¹ Under a further Act of the legislature in 1891, the town was authorized to build a dam on Walker Brook.³⁶² General power to expropriate land within one mile of the boundaries of the town was conferred in 1903.³⁶³ In 1950,³⁶⁴ an Act was passed to change the Town of Campbellton into the City of Campbellton, the municipal corporation under its new name being a continuation of the original corporation and exercising the same rights and duties.³⁶⁵ The by-laws enacted before 1950 continued in force.

Saint John

The City of Saint John was incorporated by Royal Charter in 1785, which contained no authorization for the provision of water supply and sewage services. The authorization to provide for a water and sewage system was contained in a series of enactments of the legislature, consolidated in 1914,³⁶⁶ and amended from time to time. Under this Act, the water and sewage properties previously purchased or acquired by expropriation or otherwise by the City of Saint John, by the Commissioners of Sewerage and Water Supply,³⁶⁷ by the Commissioners of Water and Sewerage in Carleton,³⁶⁸ and by the Town and City of Portland, were vested in the

353. *Ibid.*, ss. 85-90.

354. (1905), 5 Edw. VII, c. 73, s. 18, as enacted by (1965), 14 Eliz. II, c. 66 (N.B.).

355. *Ibid.*

356. (1888), 51 Vict., c. 81 (N.B.).

357. *Ibid.*, ss. 47(41), (42).

358. *Ibid.*, s. 47(37).

359. *Ibid.*, s. 47(8).

360. *Ibid.*, s. 47(15).

361. (1891), 54 Vict., c. 60 (N.B.).

362. (1954), 3 Eliz. II, c. 116 (N.B.).

363. (1903), 3 Edw. VII, c. 74 (N.B.).

364. (1950), 14 Geo. VI, c. 71 (N.B.).

365. *Ibid.*, s. 2.

366. (1914), 4 Geo. V, c. 83 (N.B.), repealed, except for ss. 4, 5, 6, 16 and 17 by (1969), 18 Eliz. II, c. 98 (N.B.).

367. Appointed (1855, 2nd Sess.), 18 Vict., c. 38 (N.B.).

368. Appointed (1854, 1st Sess.), 18 Vict., c. 6 (N.B.).

City of Saint John. The city was authorized to appropriate and convey through the Parishes of Lancaster and Simonds into the whole of the City of Saint John, portions of the Parish of Lancaster, and portions of the Parish of Simonds as described in the Act³⁶⁹ and amendments,³⁷⁰ all the water of Menzie's Lake, Ludgate's Lake and Spruce Lake in the Parish of Lancaster, and of Loch Lomond, Lake Robertson, Mispec River, Lake Lattimer and Little River in the Parish of Simonds, and the waters flowing into and from them, and any other ponds and streams within the distance of four miles from them, and any water rights connected with such water.³⁷¹ The city was further empowered to expropriate any lands necessary for creating lakes and reservoirs or for laying up and maintaining pipes, mains and conductors of water, and any land on or around the margin of such waters as far as was necessary for the preservation and purity of the water, and to connect the waters of the lakes, to erect dams, to distribute the water and to supply and dispose of it by agreement within the designated boundaries of the water district.³⁷² The Act contained fairly extensive regulation over the use of water supplied by the city and the manner of assessment. The city was further authorized to construct a system of sewers within the City of Saint John, and a number of provisions in the Act relate to the regulation and inspection of sewage works, and the empowering of the city to make by-laws relating both to sewage and to water supply.³⁷³

Certain other powers relating to water supply and sewage works within the present City of Saint John were authorized as matters of county administration, including the conferring of management, control, supervision and construction of sewers within the Parish of Lancaster upon the Lancaster Sewerage Board, subject to the control of the council of the Municipality of the City and County of Saint John³⁷⁴, the conferring of similar powers within the Parish of Simonds upon the Simonds Sewerage Board, subject to the same council³⁷⁵, the authorization of the purchase and operation by the Municipality of the City and County of Saint John of the Glen Falls water system in the Parish of Simonds³⁷⁶ and the authorization of the installation by the Municipality of the City and County of Saint John of a water system in certain portions of the Parish of Simonds to be vested in the Simonds Water Board, including power to dig wells, construct buildings, and erect reservoirs in the operation of the system, subject to the control of the council of the Municipality³⁷⁷.

The incorporation of the City of Lancaster³⁷⁸ provided for the exercise, by that corporation, of the powers and authority, within the city boundaries, of the Lancaster Sewerage Board, and of the parish councillors (under the Act to con-

369. (1914), 4 Geo. V, c. 83, s. 1 (N.B.).

370. (1933), 23 Geo. V, c. 59 (N.B.); (1947), 11 Geo. VI, c. 152 (N.B.); (1955), 4 Eliz. II, c. 139 (N.B.).

371. (1914), 4 Geo. V, c. 83, s. 4 (N.B.).

372. *Ibid.*

373. *Ibid.*, ss. 37-50.

374. (1903), 3 Edw. VII, c. 54 (N.B.).

375. (1922), 12 Geo. V, c. 66 (N.B.).

376. (1933), 23 Geo. V, c. 60 (N.B.).

377. (1950), 14 Geo. VI, c. 123 (N.B.).

378. (1952), 1 Eliz. II, c. 63 (N.B.).

solidate the laws relating to sewage and water supply in the City of Saint John and in portions of the parishes of Lancaster and Simonds, in the City and County of Saint John),³⁷⁹ together with powers of expropriation.³⁸⁰ The city also was given power to make by-laws: regulating and controlling the use of wells, springs and other sources of water supply for the city, providing for a supply of water for the city and preventing the contamination of any source of water supply or of any stream flowing through the city;³⁸¹ relating to the building, erecting, buying, leasing, controlling and operating of a water works plant;³⁸² altering the water limits of the city;³⁸³ and regulating wharves and docks on the Saint John River and preventing the filling up or encumbering of the river or the impeding of free navigation thereon.³⁸⁴ The City of Lancaster has since disappeared as a municipal corporation and has become a part of the City of Saint John,³⁸⁵ although its by-laws would, of course, remain in force until repealed by the council of the new city.³⁸⁶ In addition, the county administration has been abolished by the enactment of the Municipalities Act³⁸⁷ and repeal of the Counties Act,³⁸⁸ under which the assets and liabilities of the Municipality of the City and County of Saint John have been transferred to the Government of New Brunswick,³⁸⁹ and the assets and liabilities of the Simonds Sewerage Board, together with those of the cities of Saint John and Lancaster, transferred to the new municipality.³⁹⁰

Towns

A number of the towns in New Brunswick were incorporated from time to time by proclamation of the Lieutenant-Governor in Council under the Towns Act³⁹¹ and its predecessors: Caraquet, November 15, 1961; Dalhousie, October 4, 1905; Hartland, October 2, 1918; Newcastle, June 23, 1899; Sackville, January 4, 1903; Shediac, January 7, 1903; St. Andrews, August 5, 1903; St. George, November 8, 1904; St. Leonard, June 18, 1920. Although the Towns Act has since been repealed,³⁹² the Municipalities Act preserves by-laws already in effect in these towns,³⁹³ which may have been enacted, so far as water resources are concerned, under powers in the Towns Act to make by-laws: to establish, erect, regulate and preserve public cisterns, water reservoirs, wells, pumps and other conveniences for the supply of good and wholesome water, or for the extinguishing of fires, to make reasonable charges for the use thereof, and to prevent the waste

379. (1914), 4 Geo. V, c. 83 (N.B.); (1952), 1 Eliz. II, c. 63, s. 221 (N.B.).

380. (1952), 1 Eliz. II, c. 63, ss. 229-234 (N.B.).

381. *Ibid.*, s. 212(1).

382. *Ibid.*, s. 212(50).

383. *Ibid.*, s. 212(97).

384. *Ibid.*, s. 212(105).

385. N.B. Reg. 66-52; (1967), 16 Eliz. II, c. 81, s. 3 (N.B.).

386. N.B. Reg. 66-52, s. 10.

387. (1966), 15 Eliz. II, c. 20 (N.B.).

388. R.S.N.B., 1952, c. 44, repealed (1966), 15 Eliz. II, c. 20, s. 199 (N.B.).

389. (1966), 15 Eliz. II, c. 20, ss. 192-3 (N.B.).

390. N.B. Reg. 66-52, ss. 5-6.

391. R.S.N.B., 1952, c. 234, s. 7(2), formerly The Towns Incorporation Act, (1896), 59 Vict., c. 44, s. 8 (N.B.).

392. Municipalities Act, (1966), 15 Eliz. II, c. 20, s. 199 (N.B.).

393. *Ibid.*, s. 196(1).

and fouling of public water;³⁹⁴ to establish, make and regulate public fountains;³⁹⁵ to regulate bathing within or near the town;³⁹⁶ and to abate public nuisances.³⁹⁷

These general powers, formerly exercisable under the Towns Act, are applicable as well to a number of other towns created by private legislation and, until repealed, continue in force except insofar as there is conflict with the Municipalities Act:³⁹⁸ Chatham, incorporated 1896;³⁹⁹ Dieppe, incorporated 1951;⁴⁰⁰ Grand Falls, incorporated 1890;⁴⁰¹ Milltown, incorporated 1873;⁴⁰² Rothesay, incorporated 1956;⁴⁰³ Shippigan, incorporated 1958;⁴⁰⁴ and Sussex, incorporated 1904.⁴⁰⁵ Comparable powers are specifically set out in Acts to incorporate the towns of Marysville (1886),⁴⁰⁶ Oromocto (1956),⁴⁰⁷ St. Stephen (1871),⁴⁰⁸ and Woodstock (1956).⁴⁰⁹ In addition there are numerous Acts of the New Brunswick Legislature specifically authorizing the supply of water and sewage services by New Brunswick towns.⁴¹⁰ Power to expropriate the works and property of any company supplying water and sewage services was conferred as well upon towns incorporated under the Towns Act,⁴¹¹ and upon towns incorporated by private legislation which incorporated the provisions of the Towns Act,⁴¹² and, in other cases, more specific and comprehensive powers to expropriate land and water within a set distance from the limits of the town were given by private legislation.⁴¹³

Villages

Under the Municipalities Act, the following villages are established:⁴¹⁴ the village of Port Elgin, formerly a village, and the village of McAdam, formerly the

394. R.S.N.B., 1952, c. 234, s. 77(33).

395. *Ibid.*, s. 77(34).

396. *Ibid.*, s. 77(35).

397. *Ibid.*, s. 77(38).

398. (1966), 15 Eliz. II, c. 20, s. 14(1) (N.B.).

399. (1896), 59 Vict., c. 46, s. 20 (N.B.).

400. (1951), 15 Geo. VI, c. 62, s. 7 (N.B.).

401. (1890), 53 Vict., c. 73 (N.B.); consolidated (1958), 7 Eliz. II, c. 106, s. 99(2) (N.B.).

402. (1873), 36 Vict., c. 103 (N.B.); consolidated (1899) 62 Vict., c. 72, s. 38 (N.B.).

403. (1956), 5 Eliz. II, c. 127, s. 16 (N.B.).

404. (1958), 7 Eliz. II, c. 150, s. 14 (N.B.).

405. (1904), 4 Edw. VII, c. 56, s. 67(1) (N.B.).

406. (1932), 22 Geo. V, c. 97, s. 49 (N.B.).

407. (1956), 5 Eliz. II, c. 125, s. 65(a) (N.B.), incorporating by reference the powers contained in Part Seven of the Fredericton City Charter (1951), 15 Geo. VI, c. 69 (N.B.). The Oromocto Charter is now set out in (1968), 17 Eliz. II, c. 87 (N.B.).

408. (1871), 34 Vict., c. 20, s. 43 (N.B.).

409. (1856), 19 Vict., c. 32, s. 44 (N.B.).

410. Chatham: (1897), 60 Vict., c. 95 (N.B.); Grand Falls: (1904), 4 Edw. VII, c. 40 (N.B.); Milltown: (1905), 5 Edw. VII, c. 48 (N.B.); Newcastle: (1900), 63 Vict., c. 63 (N.B.); Sackville: (1904), 4 Edw. VII, c. 53 (N.B.); St. George: (1948), 12 Geo. VI, c. 136 (N.B.); St. Stephen: (1904), 4 Edw. VII, c. 46 (N.B.); Sussex: (1905), 5 Edw. VII, c. 68 (N.B.); Woodstock: (1882), 45 Vict., c. 80 (N.B.); Shediac: (1903), 3 Edw. VII, c. 63 (N.B.); Saint Andrews: (1917), 8 Geo. V, c. 75 (N.B.), repealed as to sections 11-15 by (1969), 18 Eliz. II, c. 95 (N.B.).

411. R.S.N.B., 1952, c. 234, s. 132, first enacted by (1903), 3 Edw. VII, c. 31 (N.B.).

412. For example: Chatham, Dieppe, Rothesay, Shippigan, Sussex.

413. Chatham: (1897), 60 Vict., c. 95 (N.B.); Grand Falls: (1904), 4 Edw. VII, c. 40 (N.B.); Milltown: (1905), 5 Edw. VII, c. 48 (N.B.); Newcastle: (1900), 63 Vict., c. 63 (N.B.); Sackville: (1904), 4 Edw. VII, c. 53 (N.B.); St. George: (1948), 12 Geo. VI, c. 136 (N.B.); St. Stephen: (1904), 4 Edw. VII, c. 46 (N.B.); Woodstock: (1882), 45 Vict., c. 80 (N.B.); Shediac: (1903), 3 Edw. VII, c. 63 (N.B.); Dieppe: (1951), 15 Geo. VI, c. 62, s. 21, as enacted by (1956), 5 Eliz. II, c. 100, s. 4 (N.B.).

414. (1966), 15 Eliz. II, c. 20, s. 23(3) (N.B.), Second Schedule, as amended by (1967), 16 Eliz. II, c. 56, s. 28 (N.B.), (1969), 18 Eliz. II, c. 58, s. 23 (N.B.).

Township of McAdam, the villages of Aroostook, Dorchester, Hillsboro, Richibucto-Rexton, Bath, Perth-Andover, Tracy, Stanley, Minto, Chipman and Surrey, which were formerly local administrative commissions, and the villages of Alma, Atholville, Barker's Point, Blackville, Bridgedale, Bristol, Buctouche, Cambridge-Narrows, Canterbury, Centreville, Chartersville, Clair, Charlo, Doaktown, Douglas-town, East Riverside-Kingshurst, East Shediac, Eel River Crossing, Fairvale, Florenceville, Fredericton Junction, Gagetown, Gondola Point, Gunningsville, Hampton, Harvey, Jacquet River, Kedgwick, Lameque, Lewisville, Lower Caraquet, Loggieville, Meductic, Millville, Nashwaaksis, North Head, Norton, Pamdenec, Paquetville, Petitcodiac, Pointe Verte, Plaster Rock, Petit Rocher, Quispansis, Renforth, Riverside-Albert, Riverview Heights, Rivière Verte, Rogersville, Salisbury, Saint Anselme, Seal Cove, Saint-Antoine, St. Basile, St. François de Madawaska, Ste. Anne de Madawaska, St. Jacques, St. Joseph, St. Louis de Kent, St. Quentin, Sussex Corner, Tide Head, and Westfield, which were formerly local improvement districts. These villages are new entities established by the Act. Services authorized under the Act may be provided by such villages if authorized by order in council,⁴¹⁵ or by plebiscite,⁴¹⁶ or where such powers were previously lawfully exercised within the territorial limits of the village by a former village, local improvement district or local administrative commission.⁴¹⁷

415. *Ibid.*, s. 7(2)(b).

416. *Ibid.* ss. 7(2)(c), 7(3).

417. *Ibid.*, s. 23(4), as enacted by (1967), 16 Eliz. II, c. 56, s. 8 (N.B.).

CHAPTER FOUR

Prince Edward Island Administrative Powers

By Alan D. Reid

PROVINCIAL STRUCTURE

General

Various departments and agencies of the government of Prince Edward Island exercise power and responsibilities affecting the development and use of water resources. Responsibility may be conferred directly on a Minister of the Crown by statute, or conferred by order in council pursuant to a statutory power vested in the Lieutenant-Governor in Council to designate the Minister responsible for a particular Act.¹

Departments of government in Prince Edward Island are established by the Public Departments Act.² Under this Act, the Lieutenant-Governor in Council is empowered to transfer any powers, duties or functions or the control or supervision of any part of the public service from one Minister to another or from one department to another.³ Accordingly, transfers of responsibility need not appear in the statutes and may be effectively accomplished by order in council.

On June 24, 1970 Premier Campbell tabled a Policy Statement on Government Reorganization, altering and consolidating, to some extent, the departmental structure. While the material to follow will reflect the existing administrative framework, references will be made to proposed changes.

Prince Edward Island Water Authority

The Prince Edward Island Water Authority exists by virtue of the Water Authority Act,⁴ and consists of not less than three and not more than five members, appointed by the Lieutenant-Governor in Council, one of whom is designated as chairman and another as vice-chairman.⁵ It exercises those general powers of a corporation consistent with the Act, in addition to special powers assigned by the Act.⁶

1. A frequent technique is to define "Minister" as the Minister charged by the Lieutenant-Governor in Council with the administration of the particular Act.

2. R.S.P.E.I., 1951, c. 128.

3. *Ibid.*, ss. 15, 16.

4. (1965), 14 Eliz. II, c. 19 (P.E.I.). [The Act has been repealed; see now the Environmental Control Commission Act, described in the Addendum, pp. 498 et seq.]

5. *Ibid.*, s. 3.

6. *Ibid.*, s. 7(1).

The Water Authority has control over the use⁷ and allocation⁸ of provincial waters, over pollution originating within the jurisdiction of the province,⁹ and over the alteration of the natural features of any watercourse or lake and the natural movement of water therein.¹⁰ It is empowered to examine water in the province to ascertain the degree of and cause of its pollution, to enter any premises to take samples of water or sewage for analysis and to make whatever other investigations it deems necessary.¹¹ The Authority may, as well, with neither consent nor compensation, lay, maintain, repair, alter or replace pipes and appurtenances through, over or under highways and roads under provincial jurisdiction,¹² but must restore them to their original condition.¹³ In addition, the Authority is empowered to make regulations pertaining to all operations involving water pollution (upon approval by the Lieutenant-Governor in Council and publication in the Royal Gazette);¹⁴ it is required to exercise the powers conferred upon the Minister of Health pursuant to regulations under the Public Health Act relating to sewers and installations for the treatment of sewage,¹⁵ and may exercise any power pertaining to pollution conferred on a minister or officer of the Crown, where it is authorized to do so by a published regulation of the Lieutenant-Governor in Council.¹⁶

Under the Act, a number of matters require the prior approval of the Authority. A Municipality which by by-law enters into agreements with other municipalities for the construction of purification plants must obtain approval of the by-law from the Authority (and from the Minister of Municipal Affairs)¹⁷ before contracting a loan for such a development.¹⁸ The Authority may, as well, upon authorization from the Lieutenant-Governor in Council, advance all or a portion of the costs of surveying and preparing plans for sewage works to service the territory of one or more municipalities.¹⁹ Provision is also made for the Lieutenant-Governor in Council to grant a subsidy to a municipal corporation or industry which carries out construction of a purification plant for water or sewage treatment,²⁰ where, after study, the Authority is of opinion that such works should be undertaken.²¹ Furthermore, the Authority must approve the plans of a municipal corporation seeking assistance under Part VI B of the National Housing Act, 1954,²² and the plans, specifications and engineer's report in relation to the establishment or extension of waterworks by a municipality or private party.²³ Where such works are undertaken without prior approval, the Authority may authorize an investigation

7. *Ibid.*, s. 14(a).

8. *Ibid.*, s. 14(b).

9. *Ibid.*, s. 14(c).

10. *Ibid.*, s. 14(d).

11. *Ibid.*, s. 16(1).

12. *Ibid.*, s. 16(2).

13. *Ibid.*, s. 16(3).

14. *Ibid.*, s. 18.

15. *Ibid.*, s. 19.

16. *Ibid.*, s. 20.

17. Under the proposed governmental reorganization this will be the Minister of Community Services: Policy Statement on Government Reorganization, June 24, 1970, pp. 32-3.

18. (1965), 14 Eliz. II, c. 19, s. 21 (P.E.I.).

19. *Ibid.*, s. 22, as enacted by (1967), 16 Eliz. II, c. 41, s. 3 (P.E.I.).

20. *Ibid.*, s. 24.

21. *Ibid.*, s. 23.

22. *Ibid.*, s. 25.

23. *Ibid.*, s. 26(1).

and order such changes as are necessary.²⁴ And where the Authority is of the opinion that the quality of water in an existing waterworks is a menace to the public health, or an existing waterworks requires alteration, the Authority may order such alterations or additions to be made.²⁵ The Authority may further order that adjoining municipalities adopt inter-connected waterworks,²⁶ and may direct the manner in which waterworks must be maintained and operated.²⁷ Similar broad controls are vested in the Authority in relation to sewage works.²⁸

The Act authorizes the Lieutenant-Governor in Council, or a member of the Executive Council as his agent,²⁹ to create bodies to acquire, construct, alter, extend, control, manage, maintain or operate waterworks or sewage works,³⁰ to constitute such bodies as bodies corporate,³¹ to prescribe their functions,³² duties and powers,³³ and to exempt them from the provisions of the Public Utilities Act.³⁴ Such corporations, or the Water Authority, may acquire, construct, establish, alter, extend, control, manage, maintain and operate water and sewage works,³⁵ provide and supply water to municipalities or persons,³⁶ receive, treat or dispose of sewage from municipalities or persons,³⁷ make agreements with municipalities or persons respecting the operation of waterworks, sewage works or water supply,³⁸ and operate waterworks or sewage works on behalf of the government, a municipality or person.³⁹ Further authority is given to the Lieutenant-Governor in Council to enter into and carry out, or to authorize a member of the Executive Council to execute as his agent,⁴⁰ an agreement with the federal government, or a member or agency thereof, or with another person or corporation providing for co-operation in the acquisition, establishment, maintenance, or operation of waterworks or sewage works for the purpose of assisting in the development or expansion of an industry,⁴¹ and, where capacity and facilities are present, to provide, in addition, services to persons other than the pertinent industry.⁴² Any authority or responsibility under such an agreement may be delegated by the Lieutenant-Governor in Council to the Water Authority, a municipality, service commission, board, body established under section 32, or any other person.⁴³

The Lieutenant-Governor in Council may appoint an advisory board to the Authority, consisting of not less than ten or more than fifteen members, one each of whom is to be appointed from the departments of Agriculture, Health, Industry

24. *Ibid.*, s. 26(2).

25. *Ibid.*, s. 26(4).

26. *Ibid.*, s. 26(4) (c).

27. *Ibid.*, s. 26(5).

28. *Ibid.*, s. 27.

29. *Ibid.*, s. 33(4), as enacted by (1967), 16 Eliz. II, c. 41, s. 4 (P.E.I.).

30. *Ibid.*, s. 32(1) (a), as enacted by (1967), 16 Eliz. II, c. 41, s. 4 (P.E.I.).

31. *Ibid.*

32. *Ibid.*, s. 32(1) (b), as amended by (1967), 16 Eliz. II, c. 41, s. 4 (P.E.I.).

33. *Ibid.*, s. 32(1) (d), as enacted by (1967), 16 Eliz. II, c. 41, s. 4 (P.E.I.).

34. *Ibid.*, s. 32(1) (e), as enacted by (1967), 16 Eliz. II, c. 41, s. 4 (P.E.I.).

35. *Ibid.*, s. 32(2) (a), as enacted by (1967), 16 Eliz. II, c. 41, s. 4 (P.E.I.).

36. *Ibid.*, s. 32(2) (b), as enacted by (1967), 16 Eliz. II, c. 41, s. 4 (P.E.I.).

37. *Ibid.*, s. 32(2) (c), as enacted by (1967), 16 Eliz. II, c. 41, s. 4 (P.E.I.).

38. *Ibid.*, s. 32(2) (d), as enacted by (1967), 16 Eliz. II, c. 41, s. 4 (P.E.I.).

39. *Ibid.*, s. 32(2) (i), as enacted by (1967), 16 Eliz. II, c. 41, s. 4 (P.E.I.).

40. *Ibid.*, s. 33(4), as enacted by (1967), 16 Eliz. II, c. 41, s. 4 (P.E.I.).

41. *Ibid.*, s. 33(1), as enacted by (1967), 16 Eliz. II, c. 41, s. 4 (P.E.I.).

42. *Ibid.*, s. 33(2), as enacted by (1967), 16 Eliz. II, c. 41, s. 4 (P.E.I.).

43. *Ibid.*, s. 33(3), as enacted by (1967), 16 Eliz. II, c. 41, s. 4 (P.E.I.).

and Natural Resources, Tourist Development, Municipal Affairs, and Public Works, as well as from the Federation of Prince Edward Island Municipalities and the Village Commissioners Association.⁴⁴ The Lieutenant-Governor in Council may also appoint local advisory boards for specified areas or designate an existing board, commission or other body as a local advisory board responsible to the Authority.⁴⁵

Prince Edward Island Power Commission

The Prince Edward Island Power Commission consists of not less than three and not more than five members appointed by the Lieutenant-Governor in Council.⁴⁶ Where the Commission recommends that these powers be conferred upon it, the Lieutenant-Governor in Council may authorize the Commission to generate and supply power,⁴⁷ to develop power sites, power projects and power plants⁴⁸ (which include all land, water, and rights to the use of water, which the Commission feels might be adopted for the supply of power,⁴⁹ and any land or any lake, river, stream, watercourse or body of water, water licence or privilege or reservoir, dam, water storage, sluice, canal, raceway, tunnel or aqueduct used for the generation of power),⁵⁰ to flood and overflow land, accumulate and store water and alter the level of rivers, lakes, streams and other bodies of water,⁵¹ to acquire by purchase, lease or otherwise the real or personal property of any person owning, operating or controlling a power site, power project or power plant⁵² and to acquire, in accordance with statute, the right to enter upon rivers, streams, waterways and erect anything required for the generation of power.⁵³ The Lieutenant-Governor in Council may further authorize the Commission to expropriate, in a manner provided for in the Power Commission Act, real or personal property, power sites, power projects or power plants,⁵⁴ to enter upon and to erect structures, installations and power plants, and to flood and overflow land and accumulate and store water upon it.⁵⁵ The power of expropriation does not extend, however, to land or plants situated within and owned by municipalities and used for generating power.⁵⁶

The Power Commission Act further contemplates agreements being entered into between municipalities and the Commission, under which municipalities may distribute power in specified areas,⁵⁷ acquire property, and acquire, erect, control and operate power plants for supplying power in power districts as approved by

44. *Ibid.*, s. 5(a). Note, however, that the constitution of such a Board will change with the proposed governmental reorganization.

45. *Ibid.*, s. 5 (d).

46. Power Commission Act, R.S.P.E.I., 1951, c. 117, s. 81(2), as amended by (1953), 2 Eliz. II, c. 36 s. 14(1) (P.E.I.). The Commission is not, however, a public utility within the meaning of the Public Utilities Act: *ibid.*, s. 99.

47. *Ibid.*, s. 2(a).

48. *Ibid.*, s. 2(d).

49. *Ibid.*, s. 1(f).

50. *Ibid.*, s. 1(h).

51. *Ibid.*, s. 2(g).

52. *Ibid.*, s. 2(h).

53. *Ibid.*, s. 2(i).

54. *Ibid.*, s. 4(a).

55. *Ibid.*, s. 4(b).

56. *Ibid.*, s. 7, as amended by (1953), 2 Eliz. II, c. 36, s. 2 (P.E.I.).

57. *Ibid.*, s. 28.

the Commission;⁵⁸ the control and management of such a plant may be entrusted to the power board of a municipality and a municipality may request the Commission to undertake expropriation proceedings on its behalf.⁵⁹

The Commission is empowered to make regulations for carrying out this Act and any contract made under it.⁶⁰

Department of Fisheries

This department is presided over by the Minister of Fisheries,⁶¹ who exercises responsibilities relating to water resources under the Fish and Game Protection Act.⁶² Under this Act, the Fish and Wildlife Division of the Department of Fisheries is established⁶³ and placed in charge of matters relating to fish and wildlife and the administration of rights, property, title, interests and claims of the Crown to and in fish and wildlife,⁶⁴ to the consumption and management of fish and wildlife,⁶⁵ to issuing of licences,⁶⁶ and to programmes of land use with respect to the preservation, maintenance and restoration of fish and wildlife habitats.⁶⁷ The Minister is empowered to refuse or cancel a licence to fish,⁶⁸ a prerequisite to fishing,⁶⁹ and may designate lands or waters as "enclosed property"⁷⁰ in which it is an offence to fish.⁷¹

Under the Act, the Lieutenant-Governor in Council may designate land as either a public or a private fishing preserve for purposes of angling,⁷² and may make regulations respecting the establishing and operation of fishing preserves⁷³ and the issuing of licences,⁷⁴ which are prerequisites to the operation of private fishing preserves.⁷⁵ Public fishing preserves are under the control and management of the Director of the Fish and Wildlife Division, subject to the direction of the Minister,⁷⁶ and are defined as land or water which is Crown owned, leased or developed, on which or on part of which fish have been reared or stocked for the purpose of angling, and which are designated as public fishing preserves.⁷⁷ Private fishing preserves refer to land or water privately owned and designated as such.⁷⁸ A further provision prohibits the contamination of inland waters of the province frequented by trout or salmon.⁷⁹

58. *Ibid.*, s. 29(a).

59. *Ibid.*, s. 29(c).

60. *Ibid.*, s. 98.

61. Public Departments Act, R.S.P.E.I., 1951, c. 128, s. 10B, as enacted by (1956), 5 Eliz. II, c. 31, s. 1 (P.E.I.).

62. (1959), 8 Eliz. II, c. 13, s. 1(s) (P.E.I.).

63. *Ibid.*, s. 2(1), as enacted by (1966), 15 Eliz. II, c. 15, s. 2 (P.E.I.).

64. *Ibid.*, s. 2(2)(a), as enacted by (1966) 15 Eliz. II, c. 15, s. 2 (P.E.I.).

65. *Ibid.*, s. 2(2)(b), as enacted by (1966), 15 Eliz. II, c. 15, s. 2 (P.E.I.).

66. *Ibid.*, s. 2(2)(c), as enacted by (1966), 15 Eliz. II, c. 15, s. 2 (P.E.I.).

67. *Ibid.*, s. 2(2)(d), as enacted by (1966), 15 Eliz. II, c. 15, s. 2 (P.E.I.).

68. *Ibid.*, s. 19.

69. *Ibid.*, s. 32(1).

70. *Ibid.*, s. 1(e).

71. *Ibid.*, s. 41, as enacted by (1966), 5 Eliz. II, c. 15, s. 7 (P.E.I.).

72. *Ibid.*, s. 26A, as enacted by (1966), 15 Eliz. II, c. 15, s. 5 (P.E.I.).

73. *Ibid.*, s. 26B(1)(a), as enacted by (1966), 15 Eliz. II, c. 15 s. 5 (P.E.I.).

74. *Ibid.*, ss. 26B(1)(b), (c), as enacted by (1966), 15 Eliz. II, c. 15 s. 5 (P.E.I.).

75. *Ibid.*, s. 26B(2), as enacted by (1966) 15 Eliz. II, c. 15, s. 5 (P.E.I.).

76. *Ibid.*, s. 26G, as enacted by (1966), 15 Eliz. II, c. 15, s. 5 (P.E.I.).

77. *Ibid.*, s. 1(y), as enacted by (1966), 15 Eliz. II, c. 15, s. 1 (P.E.I.).

78. *Ibid.*, s. 1(w), as enacted by (1966), 15 Eliz. II, c. 15, s. 1 (P.E.I.).

79. *Ibid.*, s. 36.

Department of Public Works

The Department of Public Works is presided over by the Minister of Public Works⁸⁰ who is charged with the general supervision and control of public works,⁸¹ including public buildings and other property belonging to the province or constructed, acquired or altered at the public expense except roads, bridges and other matters under the control of the Department of Highways.⁸² Under the Public Works Act, the Minister is empowered, by himself, his engineers, agents and workmen to take possession of land, streams and other watercourses where expropriation is, in his judgment, necessary for the use, construction, maintenance or repair of a public work or for obtaining better access to it,⁸³ to enter upon land for the purpose of making proper drains to carry water from a public work or for keeping drains in repair,⁸⁴ and to alter the course or level of rivers, canals, streams, watercourses, roads and streets.⁸⁵ The Act further provides that lands, streams, and watercourses acquired for a public work shall be vested in Her Majesty in the right of the province, and may be sold or disposed of under authority of the Lieutenant-Governor in Council.⁸⁶

Under the proposal for governmental reorganization this department will be merged with the Department of Highways as the Department of Highways and Public Works.⁸⁷

Department of Highways

The Department of Highways is presided over by the Minister of Highways,⁸⁸ who is charged, under the Roads Act, 1965,⁸⁹ with the supervision and general control over the building and repair of bridges and other works pertaining to roads, highways and bridges in the province.⁹⁰ The Minister is authorized to expropriate lands for the purpose of draining highways⁹¹ and is empowered to make regulations for any purpose related to the objects and purposes of the Act.⁹²

The Act also imposes on County Engineers the responsibility for opening out or closing up drains, ditches or watercourses wrongfully obstructed⁹³ and authorizes such action at the expense of the person causing the obstruction.⁹⁴

As noted above,⁹⁵ this department will be merged with the Department of Public Works, as the Department of Highways and Public Works.⁹⁶

80. Public Departments Act, R.S.P.E.I., 1951, c. 128, s. 7, as amended by (1954), 3 Eliz. II, c. 29, s. 2.

81. Public Works Act (1956), 5 Eliz. II, c. 32, s. 2 (P.E.I.).

82. *Ibid.*, s. 1(b).

83. *Ibid.*, s. 10(b).

84. *Ibid.*, s. 10(d).

85. *Ibid.*, s. 10(e).

86. *Ibid.*, s. 13.

87. Policy Statement on Government Reorganization, June 24, 1970, pp. 34-5.

88. R.S.P.E.I., 1951, c. 128, s. 7A, as enacted by (1954), 3 Eliz. II, c. 29, s. 3 (P.E.I.).

89. (1965), 14 Eliz. II, c. 22 (P.E.I.).

90. *Ibid.*, s. 5.

91. *Ibid.*, ss. 21, 22.

92. *Ibid.*, s. 52(c).

93. *Ibid.*, s. 37(2).

94. *Ibid.*, s. 39(4).

95. See text at note 87.

96. Policy Statement on Government Reorganization, June 24, 1970, pp. 34-5.

Public Utilities Commission

The Public Utilities Commission is composed of three commissioners appointed in accordance with the Public Utilities Commission Act,⁹⁷ and has the general supervision of public utilities. Under the Water and Sewerage Act,⁹⁸ these are defined as persons engaged in constructing, altering, extending, managing or controlling any system for providing the service of water or sewerage or both for the public in any area within Prince Edward Island,⁹⁹ and includes associations, bodies corporate, partnerships, and cities, towns or villages incorporated by statute.¹⁰⁰

Prior to the construction, alteration or extension of a water or sewage system, every public utility must obtain a permit from the Commission, and submit to it plans, specifications, engineers' reports, and other required data.¹⁰¹ The Commission may set requirements respecting equipment and material used in these projects,¹⁰² may order that a public utility locate on private property and set just compensation where no agreement can be made with the owner,¹⁰³ may prescribe the method by which a service shall be measured, require suitable fittings to be installed,¹⁰⁴ and set rates and charges for supplying water and sewage facilities.¹⁰⁵ The Commission may also make regulations it deems expedient for carrying out the provisions of the Act; these are effective on approval by the Lieutenant-Governor in Council and on publication in the Royal Gazette.¹⁰⁶

Department of Health

The Department of Health is presided over by the Minister of Health,¹⁰⁷ among whose functions is to advise the Lieutenant-Governor in Council and local boards in regard to public health, the means to be adopted to secure public health, and drainage, water supply and sewerage respecting any public institution or building.¹⁰⁸ Presumably acting pursuant to this advice, the Lieutenant-Governor in Council is empowered to make regulations relating to the prevention and removal of nuisances,¹⁰⁹ to the construction, maintenance, cleansing and disinfecting of all drains, sewage systems, sewers, privies, toilets and water closets, to the prevention of the pollution, defilement, discoloration or fouling of lakes, streams, pools, springs and waters,¹¹⁰ and to the plumbing and drains installed in buildings.¹¹¹ The Lieutenant-Governor in Council must also approve any construction, alteration or extension of common sewers and sewage systems or extension of common

97. R.S.P.E.I., 1951, c. 133, s. 2.

98. (1960), 9 Eliz. II, c. 47 (P.E.I.).

99. *Ibid.*, s. 1C.

100. *Ibid.*, s. 1B.

101. *Ibid.*, s. 3.

102. *Ibid.*, s. 6.

103. *Ibid.*, s. 7.

104. *Ibid.*, s. 8, as enacted by (1963), 12 Eliz. II, c. 37, s. 1 (P.E.I.).

105. *Ibid.*, s. 9, as enacted by (1963), 12 Eliz. II, c. 37, s. 2 (P.E.I.).

106. *Ibid.*, s. 28.

107. R.S.P.E.I., 1951, c. 128, s. 8, as amended by (1954), 3 Eliz. II, c. 29, s. 4.

108. Public Health Act, R.S.P.E.I., 1951, c. 129, s. 4(g).

109. *Ibid.*, s. 5(2).

110. *Ibid.*, ss. 5(5), (14).

111. *Ibid.*, ss. 5(26), (29).

sewers and sewage systems by municipal councils or private parties that has not been authorized by statute,¹¹² and may order alterations in any existing or proposed system.¹¹³

Department of Agriculture

This department exists by virtue of section 6 of the Public Departments Act,¹¹⁴ and is presided over by the Minister of Agriculture,¹¹⁵ whose primary responsibility in relation to water resources arises out of the Agricultural Rehabilitation and Development (Prince Edward Island) Act.¹¹⁶ Under this Act, the Lieutenant-Governor in Council may authorize the Minister to enter into and carry out an agreement with the federal Minister of Agriculture¹¹⁷ under the Agricultural Rehabilitation and Development Act¹¹⁸ or any other federal Act, to establish soil and water conservation projects.¹¹⁹ Expenditures are limited to the equivalent of monies expended, financial liabilities incurred, and capital advanced by the federal government.¹²⁰

Under the proposed governmental reorganization, this department will be named the Department of Agriculture and Forestry.¹²¹

Department of Industry and Natural Resources

The Department of Industry and Natural Resources exists by virtue of section 10 of the Public Departments Act,¹²² and is presided over by the Minister of Industry and Natural Resources,¹²³ who is responsible for the exercise of certain statutory duties relating to the administration and control of water resources.

Under the Well Drillers Act,¹²⁴ the Minister may regulate the digging of wells that are dug or bored for fresh water for domestic or farm purposes.¹²⁵ He is empowered to make regulations, subject to the approval of the Lieutenant-Governor in Council, requiring dry and abandoned wells to be closed or plugged and protected,¹²⁶ prescribing how this may be effected,¹²⁷ respecting the method of boring or digging wells,¹²⁸ respecting the issue of licences and permits for digging or

112. *Ibid.*, s. 14.

113. *Ibid.*, s. 15.

114. R.S.P.E.I., 1951, c. 128, s. 6.

115. *Ibid.*

116. (1962), 11 Eliz. II, c. 1 (P.E.I.). [See also the Agricultural Chemicals Act, discussed in the Addendum, at pp. 502-3].

117. The federal responsibility has since shifted to the Minister of Regional Economic Expansion.

118. The name of the federal legislation has since been changed to the Agricultural and Rural Development Act.

119. (1962), 11 Eliz. II, c. 1, s. 2(c) (P.E.I.).

120. *Ibid.*, s. 3.

121. Policy Statement on Government Reorganization, June 24, 1970, pp. 28-30.

122. R.S.P.E.I., 1951, c. 128.

123. *Ibid.*, s. 10.

124. R.S.P.E.I., 1951, c. 174.

125. *Ibid.*, s. 1(e). The Minister's responsibility, however, is placed by order in council, not by the Act, which stipulates only a Minister designate: s. 1(b), as enacted by (1967), 16 Eliz. II, c. 58, s. 1 (P.E.I.).

126. *Ibid.*, s. 6(1)(a).

127. *Ibid.*, s. 6(1)(b).

128. *Ibid.*, s. 6(1)(c).

boring wells,¹²⁹ prescribing the location of wells in relation to buildings or sanitary facilities on the same or adjoining premises,¹³⁰ and requiring every licensed person digging or boring a well to furnish such reports and returns, geological and other information and specimens as may be prescribed by regulation.¹³¹ The Minister may further prescribe areas within which it is an offence, without a permit, to dig or bore a well¹³² and within which every person, firm or corporation doing business as well diggers or drillers must first obtain a licence.¹³³ The Minister may appoint inspectors for carrying out the provisions of the Act and any directions of the Minister made under the Act or regulations.¹³⁴

Under the proposed governmental reorganization, this department will be merged with the Department of Labour and Manpower Resources to become the Department of Labour, Industry and Commerce.¹³⁵

Prince Edward Island Provincial Board

This Board exists by virtue of the Planning Act,¹³⁶ and is constituted of a chairman and four members who are to advise the Minister charged with administering the Act¹³⁷ with respect to the establishment and operation of municipal planning boards and regulations to be made under the Act, to administer those regulations and to assist municipal planning boards in the co-ordination of their activities.¹³⁸ The Board is authorized to conduct studies relating to the physical, social and economic development of a planning area and to prepare reports and recommendations on urban growth and provincial development,¹³⁹ to assist and advise any public authority in the planning of orderly and economic development of land¹⁴⁰ and to collect information, undertake research and publish material to assist and encourage the planning of orderly and economic development within the province.¹⁴¹

Among the more specific functions of the Board is the administration of regulations made by the Lieutenant-Governor in Council establishing a comprehensive plan of land development for an area lying outside a city or town.¹⁴²

General Expropriation Powers

Power to expropriate property in Prince Edward Island stems from various statutory sources to which reference has been made from time to time. The scope of these powers can only be defined by a careful examination of these statutes.

129. *Ibid.*, s. 6(1)(d).

130. *Ibid.*, s. 6(1)(e).

131. *Ibid.*, s. 6(1)(f).

132. *Ibid.*, s. 2.

133. *Ibid.*, s. 3.

134. *Ibid.*, s. 5.

135. Policy Statement on Government Reorganization, June 24, 1970, pp. 33-4.

136. (1968), 17 Eliz. II, c. 40 (P.E.I.).

137. This will be the Minister of Community Services: Policy Statement on Government Reorganization, June 24, 1970, pp. 32-3.

138. (1968), 17 Eliz. II, c. 40, s. 4 (P.E.I.).

139. *Ibid.*, s. 7(a).

140. *Ibid.*, s. 7(b).

141. *Ibid.*, s. 7(e).

142. *Ibid.*, ss. 39-41.

Discussion in this section will be limited to the Expropriation Act,¹⁴³ which empowers a Minister presiding over a department charged with the supervision of a public work to purchase or expropriate land for any purpose related to the use, construction, maintenance or repair of a public work or for obtaining better access to it.¹⁴⁴ "Public work" includes any work or property for which public money has been appropriated by the legislature other than by subsidy.¹⁴⁵

Under the Act, a Minister or his agents may, for a purpose related to the use, construction, maintenance or repair of a public work, give notice to an owner and, without his consent, enter upon his land and make surveys, take levels, make borings or sink trial pits,¹⁴⁶ take and use water, streams or other watercourses,¹⁴⁷ divert the course and level of rivers, brooks, streams or other watercourses,¹⁴⁸ and conduct water and other materials across intervening lands to the public work.¹⁴⁹

The general procedure for expropriation is to deposit in the appropriate registry office a plan and description of the land, signed by the Minister. The land then becomes vested in the Crown¹⁵⁰ either permanently or for a limited time if this is designated.¹⁵¹ The Act specifies various interested parties who may contract with the Minister as to the amount of compensation.¹⁵² Further provision is made for the Minister to obtain a warrant for possession to be directed by a Supreme Court Judge to a sheriff to put the Minister in possession where resistance is met from the former owner.¹⁵³

The Act directs the Minister to give notice to the owner within sixty days of registration of the plan, in the case of expropriation,¹⁵⁴ or to give written notice where damage has accrued by the exercise of a power other than the power to take land within sixty days of exercise of the power.¹⁵⁵ The injured party must file a claim and particulars thereof with the Minister within six months of the registration of the plan or of the injury, as the case may be, or, in the case of a continuing injury, within one year of its commencement.¹⁵⁶ Where requested by the Minister the claimant must furnish a statement showing the particulars of his estate or interest and any encumbrance upon it.¹⁵⁷ Disputes are to be settled by arbitration¹⁵⁸ before a Supreme Court judge,¹⁵⁹ pursuant to the Arbitration Act.¹⁶⁰ The judge may direct a notice to be published in a newspaper stating that the land has been taken by the Crown and calling on all entitled persons to file claims

143. R.S.P.E.I., 1951, c. 53.

144. *Ibid.*, s. 3.

145. *Ibid.*, s. 1(a).

146. *Ibid.*, s. 2(a).

147. *Ibid.*, s. 2(b).

148. *Ibid.*, s. 2(e).

149. *Ibid.*, s. 5.

150. *Ibid.*, s. 7(1).

151. *Ibid.*, s. 7(2).

152. *Ibid.*, s. 9(1).

153. *Ibid.*, s. 10.

154. *Ibid.*, s. 12.

155. *Ibid.*, s. 13.

156. *Ibid.*, ss. 12(1)(a), 13.

157. *Ibid.*, s. 24.

158. *Ibid.*, s. 16.

159. *Ibid.*, ss. 17, 1(g).

160. *Ibid.*, s. 18.

which shall be adjudicated upon by him.¹⁶¹ Where the claim exceeds five hundred dollars, either party may appeal to the Supreme Court *in banco*.¹⁶²

The Act further provides that lands, streams, watercourses and property acquired for any public work or purpose shall be vested in the Crown and may be sold, leased or otherwise disposed of when no longer required.¹⁶³

MUNICIPAL STRUCTURE

General

Most of the municipalities in Prince Edward Island exercise powers relating to the utilization of water resources in accordance with the provisions set out in either the Town Act¹⁶⁴ or the Village Service Act.¹⁶⁵ Two municipalities are not governed by the provisions of these general acts, however: the City of Charlottetown and the Town of Summerside have separate charters.¹⁶⁶

Charlottetown

The City of Charlottetown was incorporated in 1855,¹⁶⁷ and is presently governed by the City of Charlottetown Act of 1948,¹⁶⁸ consolidating and amending the several Acts incorporating the city. Under the Act, the city council is empowered to install drains and sewers in streets,¹⁶⁹ and to make by-laws relating to the peace, welfare and government of the city. These include by-laws to regulate and provide for the erection and rent of wharves, piers, quays and docks in the city and tolls on wharfage,¹⁷⁰ to prevent the filling up or encumbering of the Hillsborough River or Charlottetown harbour,¹⁷¹ and to regulate sewage in connection with the construction and repair of buildings.¹⁷²

The City of Charlottetown was originally authorized to provide a waterworks system in 1872;¹⁷³ however, the controlling Act is the Charlottetown Waterworks Act, 1887,¹⁷⁴ under which a system of waterworks for the city was authorized under the control of three commissioners, established as a body corporate under the name of the Water Commissioners for the City of Charlottetown, and elected by the citizens for this purpose¹⁷⁵ The duties of the Water Commissioners were to examine, consider and decide upon all matters relating to supplying the city with a sufficient quantity of pure and wholesome water for the use of the city and its

161. *Ibid.*, s. 23(2).

162. *Ibid.*, s. 19.

163. *Ibid.*, s. 29.

164. R.S.P.E.I., 1951, c. 162.

165. (1954), 3 Eliz. II, c. 39 (P.E.I.).

166. Charlottetown, (1948), 12 Geo. VI, c. 43 (P.E.I.); Summerside, (1959), 8 Eliz. II, c. 46 (P.E.I.).

167. (1855), 18 Vict., c. 34 (P.E.I.).

168. (1948), 12 Geo. VI, c. 43 (P.E.I.).

169. *Ibid.*, s. 36(a).

170. *Ibid.*, s. 38(4).

171. *Ibid.*

172. *Ibid.*, s. 38(49), as enacted by (1967), 16 Eliz. II, c. 64, s. 1 (P.E.I.).

173. (1872), 35 & 36 Vict., c. 26 (P.E.I.).

174. (1887), 50 Vict., c. 8 (P.E.I.).

175. *Ibid.*, s. 1.

inhabitants for all purposes, to build the necessary waterworks, reservoirs, buildings, machinery and other appliances for this object, and to improve and enlarge the works from time to time in their discretion.¹⁷⁶

The Commissioners and their agents were given power to enter upon private lands in, or within twenty miles of, Charlottetown to survey and examine the land, to test the volume of water therein, to make measurements, and to dig and sink wells. Compensation for damages was to be settled by arbitration.¹⁷⁷ The Commissioners were further empowered to ascertain, within this area, what lands they required for purposes of supplying water, to divert and appropriate springs, streams, lakes or other bodies of water which were suitable, to sink wells and make excavations in order to obtain water by filtration or percolation or from subterranean streams, to contract for the purchase of such property interests as might be affected, or to pay damages as set by arbitration¹⁷⁸ to compensate owners for injuries.

The Water Commissioners were further required to register in the office of the Registrar of Deeds and Keeper of Plans, a plan and description of the lands and waters taken.¹⁷⁹ The Commissioners were authorized to convey the water to the city through intermediate property by pipes and were given wide powers respecting the conducting of water within the city.¹⁸⁰ Further provisions related to the regulation of the distribution and use of the water, the fixing of rates, assessment for costs, the issuing of debentures, the fixing of penalties for interference with the Commissioners or with water supplies, the supplying of water to non-residents, and the election of commissioners.

The powers of the Commissioners were extended to sewage in 1898 under the Charlottetown Sewerage Act,¹⁸¹ and their name changed to the Commissioners of Sewers and Water Supply.¹⁸² They were given all powers necessary to enable them to lay out, design, construct, maintain and operate a sewage system and all buildings, pumping stations, tanks, and other equipment connected with such a system,¹⁸³ as well as the responsibility for causing all necessary surveys to be made, to decide upon the most advisable sewage system to be introduced, to construct the necessary facilities for a system and to improve upon it as the Commissioners deemed advisable.¹⁸⁴ The Act conferred on the Commissioners powers of entry upon private property within the city, upon payment of damages set by arbitration, and to acquire lands and materials compulsorily.¹⁸⁵ Wide powers were given to enter upon lands to lay pipes, tanks, gratings and other appliances.¹⁸⁶ In addition, all the power and authority conferred upon the Commissioners by the Charlottetown Waterworks Act, 1887, were expressly preserved in the body by the Charlottetown Sewerage Act.¹⁸⁷ Further provisions

176. *Ibid.*, s. 2.

177. *Ibid.*, s. 3, as amended by (1888), 51 Vict., c. 13, s. 1 (P.E.I.).

178. *Ibid.*, ss. 3, 8.

179. *Ibid.*, s. 6.

180. *Ibid.*, s. 7.

181. (1898), 61 Vict., c. 12 (P.E.I.).

182. *Ibid.*, s. 1.

183. *Ibid.*

184. *Ibid.*, s. 2.

185. *Ibid.*, s. 3.

186. *Ibid.*, s. 7.

187. *Ibid.*, ss. 27, 42.

related to assessment, debentures, regulation of domestic sewage, and the election of commissioners. In 1959, power was given to the Commissioners to fluoridate the water supply of the city to the extent and by the methods now generally approved by the Canadian Medical Association, or thereafter approved,¹⁸⁸ such power being conditioned on proclamation of the amending Act, which in turn was to be dependent on a majority vote in a plebiscite, to be held not later than the next general civic election.¹⁸⁹ This section has since been repealed and re-enacted in essentially the same form,¹⁹⁰ but now authorizes the required plebiscite to be held at any general civic election.¹⁹¹

By virtue of a 1958 amendment¹⁹² to the City of Charlottetown Incorporation Act, the powers and authority vested in the Commissioners of Sewers and Water Supply for the City of Charlottetown under the two Acts outlined above, was transferred to the City Council of the City of Charlottetown.¹⁹³ Proclamation of the Act, however, was made dependent upon the result of a plebiscite¹⁹⁴ and has not been effected.

Towns

General

The following towns exercise powers under the Town Act: Alberton, Borden, Georgetown, Kensington, Montague, and Souris, their boundaries being set out in Appendix I of the Act. The council of a town is authorized to make by-laws for its good rule, peace, welfare and government and for such purposes as preserving the banks of rivers,¹⁹⁵ preventing and abating public nuisances,¹⁹⁶ regulating, prohibiting or licensing the digging or sinking of wells,¹⁹⁷ regulating the erection, construction, alteration and repair of buildings within the town and sewage therefor,¹⁹⁸ regulating the construction of cesspools, water closets, earth closets, privy vaults and sinks on private property and the manner of draining, cleansing and cleaning and disposing of their contents,¹⁹⁹ regulating public cisterns, reservoirs and public conveniences for the supply of cool and wholesome water for private and other uses, regulating public fountains, pumps and wells, and preventing the waste and fouling of public water,²⁰⁰ and regulating bathing in public waters.²⁰¹

A town council is further empowered to lay out, excavate, dig, make, build, maintain, repair and improve drains, sewers and watercourses, and make by-laws and regulations for protecting and keeping drains, sewers and watercourses free

188. Charlottetown Waterworks Act, (1887), 50 Vict., c. 8, s. 45A, as enacted by (1959), 8 Eliz. II, c. 41, s. 1 (P.E.I.).

189. (1959), 8 Eliz. II, c. 41, s. 2 (P.E.I.).

190. *Ibid.*, s. 45A, as enacted by (1966), 15 Eliz. II, c. 52, s. 1 (P.E.I.).

191. (1966), 15 Eliz. II, c. 52, s. 2 (P.E.I.).

192. (1958), 7 Eliz. II, c. 38 (P.E.I.).

193. *Ibid.*, s. 1.

194. *Ibid.*, s. 3.

195. R.S.P.E.I., 1951, c. 162, s. 78(15).

196. *Ibid.*, ss. 78(20), (51).

197. *Ibid.*, s. 78(25).

198. *Ibid.*, s. 78(35).

199. *Ibid.*, s. 78(52).

200. *Ibid.*, s. 78(63).

201. *Ibid.*, s. 78(65).

from obstruction and for imposing rates for their use.²⁰² A council may acquire a drain or sewer constructed by any person through, under or along any street of the town upon payment of such compensation as the council deems just,²⁰³ and may, further, after notice, enter upon property and construct or repair sewers or drains or authorize their construction by the owner of the land.²⁰⁴ The Act further provides that where a council deems it necessary to construct, alter, enlarge, improve or repair a reservoir, to lay down, take up or repair water pipes or to construct, alter, enlarge, improve or repair a sewer or drain, it may enter upon and take the property of any person²⁰⁵ upon filing a plan with the town clerk²⁰⁶ and notifying the owner. Provision is made here for determining compensation by arbitration.²⁰⁷

A municipal council, upon an affirmative vote of a majority of members, is empowered, under the Municipalities Extension Act,²⁰⁸ to extend its limits by annexing by by-law contiguous areas or school districts²⁰⁹ as long as the approval of three-fifths of the property owners of the area to be annexed is obtained,²¹⁰ as well as the approval of the Lieutenant-Governor in Council.²¹¹ The effect of this annexation is to subject the annexed area to the various Acts, by-laws, rules and regulations in force in the annexing municipality at the date of annexation, except insofar as these are incompatible with the conditions of the by-law annexing the area.²¹²

A municipal council is further authorized under the Planning Act²¹³ to appoint planning boards,²¹⁴ or, by agreement, to constitute a joint planning board for two or more municipalities,²¹⁵ to investigate and obtain information relevant to, among other matters, physical, social and economic conditions in relation to the development of the municipality,²¹⁶ to prepare an official plan for adoption by the council²¹⁷ and to recommend by-laws to the council.²¹⁸ Official plans must be submitted to the Provincial Board²¹⁹ for approval.²²⁰ Where such a plan is in effect, public works which do not conform to the plan cannot be undertaken without approval from the Provincial Board.²²¹ A municipality is authorized by the Act to acquire by expropriation or otherwise, to hold, sell, lease or otherwise dispose of land in order to

202. *Ibid.*, s. 91(1).

203. *Ibid.*, s. 91(2).

204. *Ibid.*, s. 92(2).

205. *Ibid.*, s. 93(1).

206. *Ibid.*, s. 93(2).

207. *Ibid.*, ss. 95-9.

208. (1957), 6 Eliz. II, c. 23 (P.E.I.).

209. *Ibid.*, ss. 1(1), (2).

210. *Ibid.*, s. 2.

211. *Ibid.*, s. 14(2).

212. *Ibid.*, s. 15(1).

213. (1968), 17 Eliz. II, c. 40 (P.E.I.).

214. *Ibid.*, s. 9.

215. *Ibid.*, s. 18(1).

216. *Ibid.*, s. 20(a).

217. *Ibid.*, s. 20(c).

218. *Ibid.*, s. 20(e).

219. Established, *ibid.*, s. 3.

220. *Ibid.*, s. 26.

221. *Ibid.*, s. 30.

develop any of the features of the official plan.²²² Where a plan has been approved, the council may file in the proper registry office, with the Provincial Board, and in the office of the clerk of the municipality a map defining the area within which the sale of land shall be restricted,²²³ unless subdivided according to a proper plan of subdivision or unless the sale or conveyance is approved by the council.²²⁴

A council is also authorized, under the same legislation, to make regulations to implement an official plan, to establish zone systems, subdivision rules, building standards and generally to advance the general welfare, health, safety and convenience of any defined area.²²⁵

Summerside

The Town of Summerside is governed by an Act to Consolidate and Amend the Act of Incorporation of the Town of Summerside, 1903, passed in 1959.²²⁶ Under this Act, the town council is empowered to make by-laws relating to the goodwill, peace, welfare and good government of the town and, more particularly, to abate public nuisances,²²⁷ and to regulate water and sewerage in buildings.²²⁸ It is empowered to provide for and regulate the drainage of streets, highways and parks within the city limits,²²⁹ and to regulate and prevent the fouling or encumbering of wharves, docks, slips and shores within the town.²³⁰

The council is further empowered to enter upon and take possession of any land it may deem necessary for any purpose under the Act, upon tendering reasonable value in its estimation, any dispute being ultimately settled by arbitration.²³¹ This would extend to the provision of water and sewage services discussed below.

Water and sewage services in Summerside were initially authorized under the Summerside Waterworks and Sewerage Act,²³² which provided for the election of three persons to be a body corporate under the name of the Summerside Water and Sewerage Commissioners, to exercise all powers necessary to enable them to lay out, design, build, construct, maintain and operate a system of waterworks and sewerage for the town,²³³ and to conduct necessary surveys and tests and decide upon matters related to supplying the town with a sufficient supply of pure and wholesome water and the most advisable sewage system, and to improve and enlarge such works from time to time.²³⁴

To effect these objects, the Commissioners were empowered to rent or purchase such lands, water rights and easements as might be necessary,²³⁵ and to enter upon private lands in, or within ten miles from, the town to survey and examine it, to test the volume of water, to make measurements, and to dig

222. *Ibid.*, s. 34.

223. *Ibid.*, s. 37(1).

224. *Ibid.*, s. 37(2).

225. *Ibid.*, s. 40(1).

226. (1959), 8 Eliz. II, c. 46 (P.E.I.).

227. *Ibid.*, s. 70(15).

228. *Ibid.*, ss. 70(44), (53).

229. *Ibid.*, s. 73.

230. *Ibid.*

231. *Ibid.*, s. 150.

232. (1905), 5 Ed. VII, c. 16 (P.E.I.).

233. *Ibid.*, s. 1.

234. *Ibid.*, s. 2.

235. *Ibid.*, s. 3.

holes and sink wells so as to enable them to decide as to the suitability of the property for the construction of works.²³⁶ Within this area they were further empowered to ascertain the lands they might require for purposes of such works, to divert and appropriate springs, streams, lakes or other bodies of water, to sink wells and make excavations in order to obtain water by filtration or percolation, or from subterranean streams,²³⁷ and to lay pipes.²³⁸ The Act provided for compensation to be paid to persons whose interests were injured by the exercise of these powers. Disputes were to be settled by arbitration.²³⁹ The Commissioners were also to regulate the distribution and use of water and to fix rates,²⁴⁰ and were empowered to supply non-residents and to enter into agreements with railways or manufacturers outside the town, with the consent of the two councils.²⁴¹

The Act further empowered the Commissioners to make by-laws and regulations relating to the supply of water and the use of the sewage system and other related matters.²⁴²

By virtue of the 1959 consolidating legislation,²⁴³ the waterworks and sewage system of the town, previously vesting in the Summerside Water and Sewerage Commissioners, became vested in the town,²⁴⁴ and all powers and duties vesting in the Commissioners became vested in and exercisable by the town council.²⁴⁵ Furthermore, all the powers and regulations under by-laws passed by the Commissioners have continued in effect and are exercisable and enforceable by the council until repealed or amended.²⁴⁶

Finally, it should be mentioned that the council is able to exercise the powers of a municipal council under such legislation as the Planning Act and the Municipalities Extension Act, already discussed under the general sub-heading.

Villages

The following villages are affected by the provisions of the Village Service Act:²⁴⁷ Cardigan, Cornwall, Crapaud, Central Badeque, Kinkora, Miscouche, Morell, Mount Stewart, Murray Harbour, Murray River, Miminegash, O'Leary, Parkdale, North Rustico, Sherwood, St. Eleanors, St. Louis, St. Peters, Tignish, Tyne Valley, Victoria, Wellington, and Wilmot. This Act provides that where the inhabitants of a village desire to avail themselves of the powers in the Act, they shall petition, through at least twenty-five ratepayers, to the county sheriff requesting a poll of ratepayers.²⁴⁸ Provision is made for the conduct of the poll,²⁴⁹ and if a majority of voters polled are in favour of the Act applying, the Lieutenant-Governor in Council may by proclamation declare that the Act shall

236. *Ibid.*, s. 4.

237. *Ibid.*, s. 4.

238. *Ibid.*, s. 7.

239. *Ibid.*, ss. 4, 7, 8.

240. *Ibid.*, s. 10.

241. *Ibid.*, s. 32.

242. *Ibid.*, s. 55.

243. (1959), 8 Eliz. II, c. 46 (P.E.I.).

244. *Ibid.*, s. 164(1).

245. *Ibid.*, s. 164(2).

246. *Ibid.*, s. 164(4).

247. (1954), 3 Eliz. II, c. 39 (P.E.I.).

248. *Ibid.*, s. 3(1).

249. *Ibid.*, ss. 4-13.

apply to the village,²⁵⁰ define the boundaries²⁵¹ and appoint three commissioners for the village.²⁵² Provision is made for the subsequent election of commissioners. The commissioners are empowered to construct, alter, extend, improve or maintain sewers, drains and ditches within and outside the bounds of the village,²⁵³ to construct, alter, extend, improve or maintain a waterworks or water system within and outside the bounds of the village²⁵⁴ and to drain streets within the village.²⁵⁵ Where the commissioners deem it necessary to construct, alter, enlarge, improve or repair a reservoir, or to lay down, take up or repair water pipes, or to construct, alter, enlarge, improve or repair a sewer or drain, they may enter upon and take private lands,²⁵⁶ upon filing a plan with the clerk and with the Registrar of Deeds.²⁵⁷ Compensation is paid in accordance with the provisions of sections 94 to 99 of the Town Act, referred to above. The lawful exercise of these powers is dependent, however, upon the approval of the Minister charged with the administration of the Act.²⁵⁸

Community Improvement Committees

The Community Improvement Act, 1968²⁵⁹ provides that community services may be supplied in rural districts. A rural school district may elect a community improvement committee, composed of six members,²⁶⁰ as a body corporate,²⁶¹ to enter into agreements, on behalf of the residents of the district, with any municipality, incorporated village, company or other person for, among other matters, water and sewage facilities.²⁶² Provision is made for estimates and assessments to meet costs of committee undertakings.²⁶³

250. *Ibid.*, s. 14(1) (a).

251. *Ibid.*, s. 14(1) (b).

252. *Ibid.*, s. 14(1) (c).

253. *Ibid.*, s. 37(c).

254. *Ibid.*, s. 37(d).

255. *Ibid.*, s. 37(e).

256. *Ibid.*, s. 38(1).

257. *Ibid.*, s. 38(2).

258. *Ibid.*, s. 1(d), as enacted by (1962), 11 Eliz. II, c. 39, s. 1 (P.E.I.).

259. (1968), 17 Eliz. II, c. 11 (P.E.I.).

260. *Ibid.*, s. 2.

261. *Ibid.*

262. *Ibid.*, s. 2(c).

263. *Ibid.*, ss. 5-10.

CHAPTER FIVE

Nova Scotia Administrative Powers*

PROVINCIAL STRUCTURE

General

Several departments of the government of Nova Scotia have been given authority to deal with water resources under various statutes. But the Water Act¹ is by far the most important statute dealing with the administrative control of water resources, and will be discussed first. Then the administrative powers given by other statutes will be examined.

Water Act and Related Legislation

General

The Water Act deals with waters in watercourses, and surface, ground and shore waters, their ownership, use and control, and the problems of conservation and pollution. It vests in the province every watercourse (except small rivulets or brooks unsuitable for milling, mechanical or power purposes) and the sole and exclusive right to use, divert and appropriate all waters therein, freed of all claims and interests of any kind.² Having vested these rights in the province, the Act then provides for the administration and control of waters and watercourses by various governmental entities.

Minister under the Act

Much of the administrative control of waters under the Water Act is exercised under the direction of the member of the Executive Council assigned to administer the Act by the Lieutenant-Governor in Council, who will herein be referred to as the Minister.³ The Minister may, from time to time, authorize any person to use any watercourse and the waters therein for such purposes and subject to such terms and conditions, including the payment of compensation, as are deemed proper and advisable.⁴ The power does not include the authority to grant fishing rights or privileges, and all authorizations made under it are subject to the provisions of the Public Health Act.⁵ The Act also makes specific provisions respecting compensation and the use of waters for floating, but these are examined later in other

* The research for this chapter was originally prepared by a team under the direction of W. A. Mackay, and was revised by G. V. La Forest and Mrs. Lucille Kerr.

1. R.S.N.S., 1967, c. 335, as amended by (1968), 17 Eliz. II, c. 64, and (1970), 19 Eliz. II, c. 77 (N.S.).

2. R.S.N.S., 1967, c. 335, ss. 2, 1(k).

3. See *ibid.*, s. 1(d), as enacted by (1968), 17 Eliz. II, c. 64, s. 1(2) (N.S.).

4. *Ibid.*, s. 3(1), as amended by (1968), 17 Eliz. II, c. 64, s. 3 (N.S.).

5. *Ibid.*, s. 3(3), (4).

contexts.⁶ It is obvious from the foregoing that the Minister, subject to any other statute passed since the enactment of the Water Act, has very extensive control over the development of water within the legislative control of the province. Even preexisting uses are made subject to his control.⁷ The procedure to be followed for authorization to use a watercourse or its waters may be spelled out by regulations of the Lieutenant-Governor in Council, which may also contain other provisions for the more effective administration of the Act and the carrying out of its purposes.⁸

The Minister may direct that examinations or surveys be made of the use or future use of watercourses for the purposes of public water supply, fishing, agriculture, power development, recreation, domestic, industrial or other purposes or use.⁹ The Minister, or a person appointed by him, may inspect such of the works or records of anyone using a watercourse as may be relevant to the use.¹⁰ The Minister may also, by order in writing to be personally served on the person named therein, prohibit the discharge of any material into a watercourse unless the discharge has been approved under the Public Health Act or some other statute; failure to comply with such order makes the offender subject to a penalty.¹¹ In addition to the foregoing powers, there are other provisions giving the Minister control of the allocation of the use of water, and the alteration of the natural features of any watercourse or lake and the natural movement of water therein.¹²

Control and general supervision of the use and allocation of surface, ground and shore waters is given the Minister by section 12 of the Water Act.¹³ There are, in addition, several specific provisions in the Act relating to water and sewage works. When a municipality or person contemplates the establishment or extension of or change in waterworks, the plans, specifications and an engineer's report of the water supply and works, together with such other information as the Water Resources Commission may require, must be submitted to the Commission, and no such works are to be undertaken until the source of water and the proposed works are jointly approved by the Minister and the Minister of Public Health.¹⁴ If such approval has not been obtained, the Minister may order an investigation of the works and water supply and order such changes thereto as the Minister deems necessary at the expense of those undertaking the work.¹⁵ The Minister may refuse to grant his approval or do so on such terms and conditions as he deems necessary.¹⁶ The Minister may also order a municipality or person operating a waterworks to make alterations and additions deemed necessary in such manner and time as he may direct, where in his opinion the works require alteration or in the opinion of the Minister of Public Health the quality of the water in

6. *Ibid.*, s. 3(1),(2), as amended by (1968), 17 & 18 Eliz. II, c. 64, s. 3 (N.S.); for a discussion, see Chapter Fourteen.

7. *Ibid.*, s. 2, before the enactment of the Water Act ("heretofore made" in section 2) probably refers to the original Water Act of 1919, not the present Act; see the discussion at pp. 294-5.

8. *Ibid.*, s. 6.

9. *Ibid.*, s. 7(1); see also *ibid.*, s. 19.

10. *Ibid.*, s. 7(2).

11. *Ibid.*, s. 8.

12. *Ibid.*, s. 12(b),(d), as amended by (1970), 19 Eliz. II, c. 77, s. 5 (N.S.).

13. As amended by (1970), 19 Eliz. II, c. 77, s. 5 (N.S.).

14. R.S.N.S., c. 335, s. 13(1).

15. *Ibid.*, s. 13(2).

16. *Ibid.*, s. 13(3).

the waterworks is a menace to the public health.¹⁷ Moreover, the Minister may at any time direct how and with what facilities waterworks are to be maintained, repaired and operated.¹⁸

Similar provisions exist in relation to sewage works.¹⁹ The only differences are that the Minister may order necessary alterations or additions to sewage works in such manner and times as he sees fit where any sewage requires works, and there is no provision in the Act for altering or adding to sewage works where in the opinion of the Minister of Health there is a menace to public health.²⁰ The Minister, subject to regulations by the Lieutenant-Governor in Council, may assist municipalities in the construction of sewage collection and treatment works by grants or loans or by guaranteeing loans.²¹ The relevant regulations may define the assistance that may be given, prescribe the amount and forms of assistance and the terms and conditions on which it may be given, and provide for such other matters relating to such assistance as seems necessary or desirable.²²

Regulations under this power have been made.²³ They define works to which assistance may be given to comprise the construction of trunk collector sewers (i.e. sewers whose primary purpose, in the opinion of the Minister, is to collect waste from lateral branches or trunk sewer connections and convey it to a sewage treatment plant, including sanitary sewage force mains and sewage lift stations),²⁴ the construction or expansion of a central plant for the treatment and disposal of domestic sewage wastes, and a combination of these.²⁵ Before assistance will be given, the Minister must be satisfied: (1) that the project forms part of an overall plan for eliminating water and soil pollution in the municipality (which includes city, town and municipal sewage corporation concerned);²⁶ (2) that an undertaking is given by the municipality that the overall plan will be carried out in due course; (3) that the design is acceptable to the Water Resources Commission; (4) that the Minister of Municipal Affairs approves of the proposed method of financing the project; and (5) that the project is to be undertaken or controlled by one or more municipalities.²⁷ The Minister may also require evidence to his satisfaction that the municipality will satisfactorily maintain and operate a sewage treatment plant.²⁸ When the Minister is satisfied that a municipality has caused a pollution control study or survey to be made by engineers approved by the Commission and the municipality has undertaken to construct a sewer project or construct or expand sewage treatment works in consequence of the study or survey, he may advance to the municipality an amount equal to the cost of having the study or survey conducted.²⁹ When he is satisfied that a trunk collector sewer or sewage treatment plant has been satisfactorily completed

17. *Ibid.*, s. 13(4).

18. *Ibid.*, s. 13(5).

19. *Ibid.*, s. 14.

20. *Ibid.*, s. 14(4).

21. *Ibid.*, s. 15(1).

22. *Ibid.*, s. 15(2).

23. Made July 8, 1964, as amended on June 27, 1967.

24. *Ibid.*, s. 1(e).

25. *Ibid.*, s. 2.

26. *Ibid.*, s. 1(d).

27. *Ibid.*, s. 3.

28. *Ibid.*, s. 5.

29. *Ibid.*, s. 4(1).

by a municipality, he may pay the municipality a sum not exceeding 20 percent of the capital cost approved by him, including the cost of a study or survey already mentioned, less any amounts previously advanced for the study or survey.³⁰

The Act also provides that, when any municipality or person contemplates a hydro-electric power project, a control dam, a river diversion, or any alteration of a lake or watercourse or of water flow therein, the plans and such other information as the Water Resources Commission may require must be submitted to the Commission, and no such work is to be undertaken unless approved by the Minister.³¹

The Minister has general control of pollution arising within the jurisdiction of the province.³² Though there is a general provision prohibiting the discharge or deposit of material into a well, lake, river, pond, spring, stream, reservoir or other water or watercourse or on any shore or bank thereof or in any place that may cause pollution or impair the quality of water, the Minister and the Minister of Public Health may make exceptions to the prohibition.³³ Again, the Minister may by order designate an area surrounding a source of public water supply as a protected water area, and may prohibit or regulate the doing of anything in such area that may impair the quality of the water.³⁴ When the Minister has designated a protected water area, a person operating a waterworks or using for it water from that source must give notice that the area has been so designated by publishing the order, and any order of the Minister prohibiting or regulating the doing of anything in the area, in a newspaper in the county where the area is located and in the Royal Gazette, and at the direction of the Minister post signs in the area.³⁵ A person who contravenes an order of the Minister is subject to a penalty.³⁶

Finally, the Minister, for any of the purposes of the Act, may enter on lands or buildings used for commercial, industrial, or public purposes, and make such investigations as he deems necessary.³⁷

Nova Scotia Water Resources Commission

The Nova Scotia Water Resources Commission exists by virtue of the Water Act, and consists of not less than three and not more than five members appointed by the Lieutenant-Governor in Council, one of whom is designated as chairman.³⁸ Subject to the Act, the Commission has the general supervision of all watercourses in the province that come under provincial jurisdiction, may make all necessary examinations and enquiries, and is required to make such recommendations as may be deemed necessary to comply with the provisions of the Act.³⁹ The chairman is required to perform such duties as may be conferred on him by the Lieutenant-

30. *Ibid.*, s. 4(2).

31. R.S.N.S., c. 335, s. 18, as amended by (1968), 17 & 18 Eliz. II, c. 64, s. 2 (N.S.).

32. *Ibid.*, s. 12(c), as amended by (1970), 19 Eliz. II, c. 77, s. 5 (N.S.).

33. *Ibid.*, s. 16.

34. *Ibid.*, s. 17(1), (2), as enacted by (1968), 17 Eliz. II, s. 7 (N.S.).

35. *Ibid.*, s. 17(1), (3), as enacted by (1968), 17 Eliz. II, c. 64, s. 7 (N.S.).

36. *Ibid.*, s. 17(4), as enacted by (1968), 17 & 18 Eliz. II, c. 64, s. 7 (N.S.); see also *ibid.*, s. 20.

37. *Ibid.*, s. 19.

38. *Ibid.*, s. 9, as amended by (1968), 17 & 18 Eliz. II, c. 64, ss. 2, 5 (N.S.).

39. *Ibid.*, s. 9(3), as enacted by (1970), 19 Eliz. II, c. 77, s. 2 (N.S.).

Governor in Council.⁴⁰ The Lieutenant-Governor in Council may also authorize the payment of remuneration to members of the Commission.⁴¹

The functions and duties of the Commission in relation to water and sewage works, dams, electric power developments and diversions have already been described in dealing with the functions of the Minister. In common with the Minister, members of the Commission or persons authorized by it may, for the purposes of the Act, enter on lands or buildings used for commercial, industrial or public purposes and make such investigations as they deem necessary.⁴²

Other Administrative Functions under the Water Act

The Water Act also makes provision for the creation and incorporation by the Lieutenant-Governor in Council of a body or bodies to acquire, establish, maintain or operate any water or sewage works.⁴³ Any such body may be given power to own and alienate property, to engage staff, to borrow, to collect charges for services, to fix the remuneration of its members, and to operate water and sewage works for others, but the exercise of such powers may be made subject to the approval of the Lieutenant-Governor in Council.⁴⁴ Such a body or its works may be exempted in whole or in part from the provisions of the Public Utilities Act.⁴⁵

The Lieutenant-Governor in Council is also empowered to enter into and carry out any agreement with the government of Canada or a member or agency thereof, or with other persons, municipalities or corporations for cooperation in the acquisition, construction, establishment, maintenance or operation of water or sewage works for the purpose of assisting in the development or expansion of any industry or for municipal purposes.⁴⁶ The Lieutenant-Governor in Council may also enter into and carry out an agreement respecting any matter or purpose mentioned in the Canada Water Act with the federal Minister of Energy, Mines and Resources or the federal government or an agency mentioned in that Act, or he may authorize the Minister or another member of the Executive Council or the Commission to do so.⁴⁷ The Lieutenant-Governor in Council may delegate to a municipality, service commission, board or a body described in the preceding paragraph or any other person or authority to carry out any of the activities, or discharge any responsibility or obligation assumed by the Lieutenant-Governor in Council under this paragraph.⁴⁸ Finally, the Lieutenant-Governor in Council may authorize any member of the Executive Council to execute the necessary agreements and instruments for the exercise of the powers conferred by this section.⁴⁹

40. *Ibid.*, s. 9(4), as enacted by (1970), 19 Eliz. II, c. 77, s. 2 (N.S.).

41. *Ibid.*, s. 11, as amended by (1968), 17 Eliz. II, c. 64, s. 2, and (1970), 19 Eliz. II, c. 77, s. 4 (N.S.).

42. *Ibid.*, s. 18, as amended by (1968), 17 Eliz. II, c. 64, s. 2 (N.S.).

43. *Ibid.*, s. 21(1).

44. *Ibid.*, s. 21(2)(c).

45. *Ibid.*, s. 21(2)(e).

46. *Ibid.*, s. 22(1), as amended by (1970), 19 Eliz. II, c. 77, s. 6(1) (N.S.).

47. *Ibid.*, s. 22(2), as enacted by (1970), 19 Eliz. II, c. 77, s. 6(2) (N.S.). [The appropriate federal Minister is now the Minister of the Environment; see Addendum, p. 483].

48. *Ibid.*, s. 22(3).

49. *Ibid.*, s. 22(4).

Environmental Pollution Control Act

Another Act that falls under the administration of the Minister assigned to administer the Water Act is the Environmental Pollution Control Act.⁵⁰ This Act establishes the Nova Scotia Environmental Pollution Council, which is composed of representatives of the Departments of Lands and Forests, Highways, Public Health, Municipal Affairs, Trade and Industry and of the Water Resources Commission, and one or more persons in the public service appointed by the Lieutenant-Governor in Council.⁵¹ The Lieutenant-Governor in Council may designate one of the members as chairman, whose duty it is to call the meetings and report on the proceedings to the Minister.⁵² The Minister may require any department, board, commission or agency to provide to the Council such administrative and professional assistance and such facilities as it may require.⁵³ The Council is required to make a report to the Minister on its activities for each year.⁵⁴ The functions and powers of the Council are thus enumerated: to investigate any situation that might cause pollution; to consider and prepare plans and programs to combat, eliminate or mitigate pollution; to co-ordinate the work and efforts of departments, boards, commissions, agencies and officers of the province in matters relating to pollution control; to cooperate with others in any matter relating to pollution; and to perform such other acts and duties as may be assigned to the Council by the Lieutenant-Governor in Council or the Minister.⁵⁵ The Council may require any department, board, commission or agency of the province or any officer of the province to investigate and report to the Council on any matter related to pollution or the control of pollution.⁵⁶

Part II of the Act spells out steps that may be taken to prevent pollution. Under section 4, when, by reason of any act or omission, pollution that is harmful to the public health, safety or welfare has occurred, or is likely to occur, the Minister may direct the Water Resources Commission to investigate and report to the Minister. Where the report recommends that it is in the public interest to require that something be done, and the Minister approves the report, the Commission may make an order requiring any person to take remedial action. Any person who fails to take the action required is guilty of an offence and is liable on summary conviction to a penalty not exceeding five thousand dollars. In addition, a person so convicted is liable to a penalty not exceeding one thousand dollars a day for each day he fails to take the action required by the order.

Finally, section 5 provides that the Minister may by order authorize the Commission to take any remedial action required to combat, eliminate or mitigate a cause of pollution. Where action has been taken pursuant to such order necessitated by the failure of any person to comply with an order made under section 4, the costs and expenses may be recovered from the person by action in any court of competent jurisdiction. The Minister may refuse to make an order under

50. (1970), 19 Eliz. II, c. 4 (N.S.).

51. *Ibid.*, s. 2(1).

52. *Ibid.*, s. 2(2).

53. *Ibid.*, s. 2(3).

54. *Ibid.*, s. 2(4).

55. *Ibid.*, s. 3(1).

56. *Ibid.*, s. 3(2).

section 5 if there is no reasonable possibility of recovering the costs and expenses from the person or if the act that caused the pollution is authorized by an enactment.

Department of Public Health

The Public Health Act contains several provisions respecting pollution of waters and the supply of safe drinking water. It is administered by the Minister of Public Health, who may make regulations respecting any matter relevant to the public health. In particular, these regulations may provide for safe and potable water supplies, for the control of sources of water and systems of distribution, for the prevention of contamination or pollution of water used for human consumption, for plumbing and drainage of buildings (including the adoption, with or without modifications, of relevant parts of the National Building Code of Canada), respecting public drains and sewers, and for preventing the pollution of lakes and streams.⁵⁷ Regulations have been made respecting summer camps that regulate water supply, washrooms, sewage disposal, drainage, and swimming and other water activities.⁵⁸

The Act also provides that where a municipality or other person contemplates the establishment or extension of a public water supply or sewage system, the municipality or person must submit in duplicate plans and specifications relating thereto and shall not undertake work on it until the plans and specifications have been approved by the Minister.⁵⁹ Similar provisions appear in the Water Act, where the powers of the Minister under that Act are discussed.

The Act also gives powers and duties to boards of health and medical health officers. Thus a board of health may, if it is of the opinion that a well is unsafe or unsanitary, order the well to be filled up or closed.⁶⁰ A medical officer may order a person to remove from any beach or foreshore, whether public or private, any offensive matter or thing likely to endanger the public health or to become a nuisance that he has placed there, and if such person cannot be located, the medical officer may order it removed at the expense of the municipality.⁶¹

Department of Lands and Forests

Several statutes are administered by the Minister of Lands and Forests (in this section called the Minister). Under the Lands and Forests Act, the Lieutenant-Governor in Council may, on the recommendation of the Minister, reserve such Crown lands as he deems expedient for, *inter alia*, protecting and regulating the flow of water within the lands reserved, and for the development of water power therefrom.⁶² The Lieutenant-Governor in Council may also, on the recommendation of the Minister, lease Crown lands of inferior quality on such terms as may be prescribed to persons who undertake to expend money

57. R.S.N.S., 1967, c. 247, s. 11(1).

58. Made July 25, 1967, and tabled Dec. 1, 1967.

59. *Ibid.*, s. 41(1).

60. *Ibid.*, s. 37(3).

61. *Ibid.*, s. 48.

62. R.S.N.S., 1967, c. 163, s. 13. For various grants and leases under this Act, see the following orders in council: 27-102 of July 13, 1920; 32-162 of Oct. 1, 1926; 41-287 of Feb. 27, 1936; 60-139 of Oct. 19, 1951; 61-129 of Apr. 22, 1952; 75-329 of May 24, 1961; 76-99 of Aug. 29, 1961; 85-169 of June 20, 1967; 85-237 of July 25, 1967.

in draining, dyking or developing the land.⁶³ He may also on the recommendation of the Minister lease to any person Crown lands or lands covered with water, or the right of flowage over such lands for the purpose of storing water or creating reservoirs or basins for developing and maintaining water power for mining or other purposes.⁶⁴

Timber leases heretofore granted do not confer on the lessee any exclusive right to land covered with water, watercourse flowage or water power; these may at any time be dealt with under the Act as if the lease had not been issued.⁶⁵ The Act does provide that the Lieutenant-Governor in Council may lease to anyone the privilege of placing dams, sluices or other works on any stream for the purpose of floating timber at such price as may be fixed by the Minister with the approval of the Lieutenant-Governor in Council.⁶⁶

The Lieutenant-Governor in Council may also grant to any municipality without compensation any Crown lands wholly or partially covered with water either absolutely or upon any trust of a public nature or for the benefit of the inhabitants of the municipality or for the public.⁶⁷

The Act also authorizes the Minister, with the approval of the Lieutenant-Governor in Council, to grant permission to construct and maintain electric power lines and water and sewer lines in or on Crown lands for such period and upon such terms and conditions as the Lieutenant-Governor in Council prescribes.⁶⁸

Finally, under section 209, the Lieutenant-Governor in Council may designate all or part of any watercourse for rearing ponds or protected fishing areas. Subject to the Water Act and to such terms and conditions as he may impose, the Minister may, by written permit, authorize a person to establish a fishing pond for the propagation of fish, and protected fishing areas. Fishing licences, which are required to fish in any watercourse, do not grant permission to fish in protected fishing areas and rearing ponds. The section further creates offences prohibiting the removing of sand or gravel from any watercourse so as to endanger any trout or salmon spawning ground, the destroying or damaging of fish or rearing ponds, fishing in such a pond or in a protected fishing area without the consent of the Minister, or fishing in any watercourse while swimming or skin diving. Regulations under the section may provide for a system of fishing licences and for the manner in which public notice may be given by posting signs or otherwise, of the designation of any protected fishing area.⁶⁹

The Minister is also given broad control over beaches by the Beaches and Foreshores Act⁷⁰ and the Beaches Protection Act.⁷¹ Under the former statute the Lieutenant-Governor in Council may, on written application being made to the Minister, grant or lease to any person any ungranted flat, beach or foreshore on

63. *Ibid.*, s. 31(1).

64. *Ibid.*, s. 33(1).

65. *Ibid.*, s. 31(3).

66. *Ibid.*, s. 34.

67. *Ibid.*, s. 20.

68. *Ibid.*, s. 38.

69. Such designations and regulations were tabled February 24, 1964.

70. R.S.N.S., 1967, c. 19.

71. R.S.N.S., 1967, c. 20.

the coasts of the province,⁷² but he may not grant or lease any fishing rights in rivers or fresh water lakes.⁷³ He may also, on a similar application, authorize leases of land to be made in the name of the Queen represented by the Minister to establish fish traps or weirs on the coasts of the province on such terms and conditions as he may determine.⁷⁴ Finally, the Act prohibits the cultivation of oysters on any beach, flat, harbour river, lake or foreshore without having obtained a lease; lands leased are not to exceed five acres, and the length is not to exceed twice its breadth.⁷⁵

The Beaches Protection Act authorizes the Lieutenant-Governor in Council, on the recommendation of the Minister, to designate areas of land lying under a tidal water or adjacent to such lands as protected beaches.⁷⁶ The Act prohibits the defacing or alteration of a protected beach⁷⁷ and, except with the permission of the Minister, the taking or removal of sand, gravel or stone or other material therefrom.⁷⁸ A person who but for the Act would have the right to remove such material may apply to the Minister to do so,⁷⁹ and if he is refused and he has use for the material, he is entitled to compensation from the Minister; if the compensation cannot be agreed upon it is to be determined in the same manner as under the Expropriation Act.⁸⁰ Another section authorizes the Minister to post signs on or near Crown land extending seaward from high water mark warning the public that the beach is a protected beach, and where such a sign has been posted it is prohibited to remove sand, gravel or other material from such land or otherwise to deface or alter the land except with the permission of the Minister and subject to the conditions he may lay down in such permission.⁸¹

Finally, under the Provincial Parks Act, the Minister may, with the approval of the Lieutenant-Governor in Council, make regulations for the issuing of permits for fishing in a park, respecting the establishment and use of reservoirs of water in a park, and respecting the use of water craft within a park.⁸²

Department of Fisheries

The Minister of Fisheries has the administration of several statutes relating to water resources.

Under the Irish Moss Act⁸³ the Minister may, with the approval of the Lieutenant-Governor in Council issue licences to harvest Irish moss in areas of the solum on sections of the coastline in the counties of Antigonish, Cumberland, Halifax and Lunenburg described in the Act, but no licence is to be granted to an area granted or leased under the Beaches and Foreshores Act.

72. R.S.N.S., 1967, c. 19, s. 1(1).

73. *Ibid.*, s. 1(4).

74. *Ibid.*, s. 5.

75. *Ibid.*, s. 4.

76. R.S.N.S., 1967, c. 20, s. 1(1).

77. *Ibid.*, s. 3.

78. *Ibid.*, ss. 2, 5(2).

79. *Ibid.*, s. 5(1).

80. *Ibid.*, s. 5(3).

81. *Ibid.*, s. 6; the prohibition seems repetitious.

82. R.S.N.S., 1967, c. 244, s. 12(1)(j), (l), (m).

83. R.S.N.S., 1967, c. 154, ss. 1-3.

Under the Oyster Fisheries Act, the Lieutenant-Governor in Council may cause surveys to be made of the beds of bays, rivers, harbours and creeks, lay them off into plots and lease them for such consideration and for such term as may seem expedient.⁸⁴ Persons making such surveys may go on lands of any person adjoining or abutting the area surveyed and in doing so, may drive stakes and erect marks, whether permanent or otherwise, on such lands.⁸⁵ Areas granted before the passing of the Act and natural or live oyster beds are to be excluded from the survey.⁸⁶ Where the owner of the adjoining land applies for a lease of the bed in front of his foreshore, the lease may be on such terms and for such period as the Lieutenant-Governor in Council thinks proper, but it is not to exceed five acres.⁸⁷ When the applicant is someone other than the owner of the adjacent land, notice in the manner and form spelled out in the Act must be given to the owner by newspaper advertising and by serving the notice on the persons resident thereon, and if no one resides on the land, by posting it on a conspicuous place on the land.⁸⁸ A lessee is required to have the area leased marked, and keep it marked; when so marked it constitutes evidence of ownership in prosecutions for taking oysters or otherwise interfering with the bed.⁸⁹

The Act is made subject to the Fishery Regulations of Canada, and nothing therein is to prejudice the right of Canada to use and enjoy a public harbour for purposes other than the cultivation of oysters.⁹⁰ An agreement between the governments of Canada and Nova Scotia in the Schedule to Part II of the Act gives the Minister of Fisheries of Canada control of live oyster areas.

Finally, under the Sea Plants Harvesting Act the Minister, with the approval of the Lieutenant-Governor in Council, may issue licences for harvesting sea plants in specified areas extending seaward from mean high water mark.⁹¹ With like approval he may also designate public harvesting plants.⁹² Licences may not be issued for areas for which another licence is in force or in a public harvesting area.⁹³

Department of Mines

Several Acts dealing with water resources are under the administration of the Minister of Mines.

Section 106 of the Coal Mines Regulations Act contains the rather technical provisions that apply in the working of coal or stratified deposits in submarine areas.⁹⁴ Several of these provisions vest powers in the Chief Inspector. Thus no coal is to be mined in a submarine area until the proposed system and plans of working are approved by him in writing, and no change is to be made to an approved system without his written sanction.⁹⁵ Again, barriers of coal at least thirty feet thick must be left against all faults of which the dislocation exceeds

84. R.S.N.S., 1967, c. 220, s. 2.

85. *Ibid.*, s. 3.

86. *Ibid.*, s. 5.

87. *Ibid.*, s. 4.

88. *Ibid.*, s. 6(1).

89. *Ibid.*, s. 11.

90. *Ibid.*, s. 15.

91. R.S.N.S., 1967, c. 279, ss. 1(d), 2(1).

92. *Ibid.*, s. 2(2).

93. *Ibid.*, s. 2(3).

94. R.S.N.S., 1967, c. 36.

95. *Ibid.*, s. 106(1)(c).

thirty feet or whose sides are more than two feet apart, but the Chief Inspector may permit the driving of such number of narrow places of such size through a fault as he sees fit in order to mine the coal beyond.⁹⁶ A part of section 14 of the Metalliferous Mines and Quarries Regulation Act sets forth safety rules for handling water in mines.⁹⁷ Among these are rules giving power to an inspector. Section 111 of the Mines Act empowers the Minister to enable a lessee of Crown lands to acquire lands of other persons in order, *inter alia*, to supply or drain water for mining operations, or supplying miners' dwellings with water.⁹⁸ Similar powers are given the Minister to enable lessees of submarine areas to ventilate their mines by means of tunnels through adjoining areas held by other persons.⁹⁹ The Mining Companies Easement Act applies the procedure in section 111 of the Mines Act to owners of mineral or oil rights who are not lessees of the Crown under the Mines Act.¹⁰⁰ The relevant provisions of the last three Acts are dealt with in Chapter Twenty-one.

The Lieutenant-Governor in Council may declare persons carrying on milling, mining, smelting or refining to be subject to the Smelting and Refining Encouragement Act, and a person who is the subject of such a declaration is given certain immunities from liability against pollution.¹⁰¹ The Act is dealt with under the Nova Scotia statutes in Chapter Fourteen.

The Well Drilling Act requires a person to obtain a licence to carry on the business of well drilling, and subject to the Public Health Act, the Lieutenant-Governor in Council is empowered to make regulations respecting the location, drilling, construction, testing and capping of wells, and the methods and materials to be used.¹⁰² The Act is discussed in more detail in Chapter Twenty-one.

Department of Agriculture and Marketing

Three Nova Scotia statutes dealing with water resources fall under the administration of the Minister of Agriculture and Marketing.

Under section 197 of the Agriculture and Marketing Act, the Minister, with the approval of the Lieutenant-Governor in Council, may enter into an agreement with the government of Canada or an agency thereof for the execution of work or a program of work for the protection, reclamation, conservation and improvement of land and for its more effective and economical use.¹⁰³ In order to carry out such agreement, the Minister may construct drains, roads, breakwaters, dams, ditches, canals, excavations and other works.¹⁰⁴

The Agriculture and Rural Credit Act establishes the Nova Scotia Farm Loan Board, a corporation consisting of five members appointed by the Lieutenant-

96. *Ibid.*, s. 106(1)(e).

97. R.S.N.S., 1967, c. 183, s. 14(208)-(212).

98. R.S.N.S., 1967, c. 185, s. 111(1).

99. *Ibid.*, s. 119(1).

100. R.S.N.S., 1967, c. 187, ss. 1, 2.

101. R.S.N.S., 1967, c. 283.

102. R.S.N.S., 1967, c. 337, ss. 1, 3, 9; regulations were made on Oct. 26, 1964, and tabled Feb. 18, 1965, and amended Jan. 24, 1966 (tabled Feb. 23, 1966) and May 14, 1968 (tabled Feb. 20, 1969).

103. R.S.N.S., 1967, c. 3, s. 197.

104. *Ibid.*, s. 200(b).

Governor in Council.¹⁰⁵ The Board may make or guarantee loans for improving farms.¹⁰⁶ This would appear to envisage loans for such things as drainage, dams, irrigation and canals.

The Marshland Reclamation Act empowers the Minister, with the approval of the Lieutenant-Governor in Council, to construct, reconstruct, operate and maintain works for protecting, draining and improving marshlands, and for this purpose he may, *inter alia*, enter into agreements with the government of Canada or any other province or any department, body or person.¹⁰⁷ Subject to the same approval, the Minister may designate the boundaries of any marshland tract for carrying out any project under the Act.¹⁰⁸ The Lieutenant-Governor in Council may appoint a Marshland Reclamation Commission.¹⁰⁹ Moreover, the owners or occupants of marshland may petition the Provincial Secretary that the owners be incorporated as a marsh body.¹¹⁰ Only in exceptional circumstances will a certificate of incorporation be issued for more or less than a marshland tract (i.e., an area of marshland that may be effectively dealt with as a unit in the construction and maintenance of works).¹¹¹ When a certificate of incorporation has been issued, the Marsh Act does not apply, and the body has power to conduct works, make regulations subject to the approval of the Commission, and raise money by borrowing or levying rates.¹¹² There are also a number of private Acts dealing with specific bodies or tracts of marsh. These are listed in Chapter Twenty-one.

Department of Highways

The Public Highways Act empowers the Minister, or any person authorized by him to construct, open, maintain or repair drains, gutters, sluices or water-courses on land adjoining highways and to enter on any land for the purpose; anyone who hinders the Minister or a person authorized by him in doing this is liable to a penalty.¹¹³ If a person collects water on his land and it flows on the highway, the Minister, in addition to bringing action, may, if in his opinion the flow requires new or larger drains, sluices, or culverts on the highway or makes necessary any alteration in the highway, hold the person liable for the expenses of any such construction or alteration.¹¹⁴

Department of Trade and Commerce

The only relevant Act under the administration of the Department of Trade and Commerce is the Hotel Regulations Act, under which the Lieutenant-Governor in Council may make regulations respecting the provision of a safe and adequate water supply in hotels and hotel drainage and sewage systems.¹¹⁵

105. R.S.N.S., 1967, c. 4, s. 2(1).

106. *Ibid.*, s. 6(a).

107. R.S.N.S., 1967, c. 177, s. 2.

108. *Ibid.*, s. 3.

109. *Ibid.*, s. 5(1).

110. *Ibid.*, s. 11(1).

111. *Ibid.*, ss. 13, 1(e).

112. *Ibid.*, ss. 11(8), 16.

113. R.S.N.S., c. 248, s. 43.

114. *Ibid.*, s. 44.

115. R.S.N.S., 1967, c. 127, s. 10(1)(k), (1).

Department of Provincial Secretary

Where an Act provides for applications to be made and does not provide to what department the application should be directed, it falls within the administration of the Provincial Secretary. One such Act is the Ferries Act, under which the Lieutenant-Governor in Council is empowered to establish certain ferries and agree with and grant licences to ferrymen under such regulations and at such rates of ferriage as he shall establish.¹¹⁶ The ferries that come under his jurisdiction are the ferry from Grand Narrows to Iona, the ferry at Little Narrows and the ferry at Englishtown, all on Cape Breton Island; the ferry at Petite Passage, Tiverton to mainland and the ferry at Grand Passage, Freeport to Westport, both in the County of Digby; the ferry at LaHave Mouth, West to East side in the County of Lunenburg; and the ferry at Lower River Inhabitants in the County of Richmond.

Under the Private Ways Act, every owner or occupier of a mine, mill, quarry, farm or factory who wishes to transport the produce to water, and every owner or occupier of timber lands who wishes to cut the timber thereon and remove it to water, and who is unable to agree with the owner of the land, may petition the Lieutenant-Governor in Council for a right of way over lands belonging to another.¹¹⁷

Department of Municipal Affairs

The legislation within the administration of the Department of Municipal Affairs will be dealt with in dealing with the municipal structure.

Nova Scotia Power Commission

The Nova Scotia Power Commission is a body corporate whose general powers under the Power Commission Act enable it to do everything incidental to the generation, distribution and supply of electric power in any part of the province or elsewhere, including the power to accumulate, store, divert, supply, use or otherwise dispose of water and anything incidental thereto.¹¹⁸ With the approval of the Lieutenant-Governor in Council the Commission may, *inter alia*, by purchase, lease or otherwise, or by expropriation, acquire lands, watercourses, water privileges, and works and plants used or adopted for generating, accumulating, distributing, supplying or utilizing electric power from water power, and it has similar powers in relation to the accumulation, storage, distribution and supply of water.¹¹⁹ With the same approval it may also distribute electric power through, over, under, along or across any lands, watercourses or bridges.¹²⁰ The breadth of these powers is underlined by the definitions in the Act. "Land" and "property" are broadly defined to include, *inter alia*, "watercourses", and a watercourse includes the bed and every source of water supply, whether it usually contains water or not, and every stream, river, lake, pond, creek, spring, ravine and gulch.¹²¹

116. R.S.N.S., 1967, c. 105, ss. 1, 5.

117. R.S.N.S., 1967, c. 237, ss. 1(1).

118. R.S.N.S., 1967, c. 233, s. 22(1). [Reference should also be made to the Tidal Power Corporation Act; see Addendum, p. 504].

119. R.S.N.S., 1967, c. 233, s. 22(1).

119. *Ibid.*, s. 22(2) (c), (e).

120. *Ibid.*, s. 22(2) (d).

121. *Ibid.*, s. 1(b), (e), (g).

The Commission may contract with any person who generates or distributes electric power to supply power to the Commission.¹²² It may, without the consent of the owner, enter any land on which any water, watercourse or water privilege is situate or which, in the opinion of the Commission, is capable of development for providing water power, including the storage of water, or for facilitating the passage of logs and timber; it may also construct dams, sluices, canals, raceways and other works for these purposes, and flood and overflow lands to provide storage or for any other purpose in connection with such works.¹²³ The Commission may also enter into contracts with municipalities, corporations or individuals for the use of any works of the Commission, and in the absence of such contract may charge such tolls for the use of its works, water power or water as it may deem reasonable having regard to the capital and operating costs of the works and the benefit received by the municipality, corporation or individual.¹²⁴ The Commission is also entitled, without the consent of the owner, to use any lands or watercourses, dams and other structures and distributing systems, and any easements or other privileges required for the storage of water, back flowage, the erection of buildings or structures or doing any work thereon, or for the development or exercise of any water right, privilege, power or other work undertaken by the Commission, a municipality, corporation or an individual.¹²⁵ Finally, the Commission may acquire by purchase, lease or otherwise or by expropriation any property for the purpose of generating, distributing, supplying and utilizing electric power in a municipality whose council has entered into an agreement with the Commission for a supply of electric power, and sell any such property to the municipality at a price not less than it cost the Commission.¹²⁶ The Commission is obliged to pay due compensation to an owner of land entered upon, taken, used, or injuriously affected for damages necessarily resulting from the exercise of such powers beyond any damage the owner may derive from the contemplated work.¹²⁷

The powers given the Commission are both by law and practice limited by the provisions of the Water Act. This matter is discussed in Chapter Fourteen.

Expropriation

Under the Expropriation Act any Minister in control of a public work¹²⁸ may, without the consent of the owner and for any purpose relating to the maintenance or construction of a public work, or for obtaining access to it, enter upon, take and use any land, stream, water or watercourse; he may deposit materials on the land or carry them away, divert or alter rivers, canals, brooks, streams or watercourses or change their level, and divert or alter the position of any water pipe, sewer, or drain.¹²⁹ Where a wall or fence has to be taken down, or a ditch or a drain constructed, a landowner adjoining the public work must

122. *Ibid.*, s. 22(3) (a).

123. *Ibid.*, s. 22(3) (b).

124. *Ibid.*, s. 22(3) (c).

125. *Ibid.*, s. 22(3) (d).

126. *Ibid.*, s. 22(3) (f).

127. *Ibid.*, s. 23(10).

128. R.S.N.S., 1967, c. 96.

129. *Ibid.*, s. 2(1) (b), (c), (e), (f).

maintain them after the work has been completed.¹³⁰ For any damage resulting from compulsory powers exercised by the Minister, a landowner may receive compensation; should the Minister and owner disagree as to the amount, the compensation is determined by arbitration under the Act.¹³¹

The powers of expropriation of the Nova Scotia Power Commission have already been discussed.

MUNICIPAL STRUCTURE

General

The statutes relating to various municipal units enable municipalities, cities, towns and villages to supply themselves with water works and sewers, make regulations regarding such works, and finance these works and others pertaining to the operation of ferries, and acquire waters used for fire extinguishing purposes.

Municipal Act

Definition

The first of these statutes is the Municipal Act. Under that Act, a municipality is a body corporate made up of inhabitants (other than of a city or incorporated town) of each of the following counties: Annapolis, Antigonish, Cape Breton, Colchester, Cumberland, Halifax, Inverness, Kings, Pictou, Queens, Richmond, and Victoria; and of each of the following districts: Argyle, Barrington, Chester, Clare, Digby, East Hants, Guysborough, Lunenburg, Shelburne, St. Marys, West Hants, and Yarmouth.¹³² All docks, wharves and similar structures connected with the shore of a municipality are considered to be part of the municipality.¹³³

Finance

The council of a municipality has the right to levy rates and pay money for many purposes, including: assisting in or establishing and operating ferries; the control of ponds, reservoirs, brooks, canals and other waters to be used in extinguishing fires; matters concerning the maintenance and operation of public sewers and drains of the municipality; matters concerning the maintenance, operation and treatment of water in a water system. The amount required for the last purpose must be raised by rates determined by the Public Utilities Act, and only a deficit may be raised by taxation.¹³⁴

Expropriation

With the consent of the Minister, a council may expropriate land where it is necessary for matters pertaining to a reservoir, a water system or waterworks or sewers and drains. "Land" as used here includes, subject to the Water Act, a stream, watercourse or land covered with water and a right of way, easement or privilege in, under, upon or relating to land, including the right to dam up or stop the flow of water or to overflow land.¹³⁵

130. *Ibid.*, s. 4.

131. *Ibid.*, s. 16.

132. R.S.N.S., 1967, c. 192, s. 2.

133. *Ibid.*, s. 8(4).

134. *Ibid.*, s. 136(10), (18), (39), (40).

135. *Ibid.*, s. 172(1), (2).

By-Laws

A council may make by-laws, not inconsistent with any other Act, regulating the construction and management of booms and for log driving; fixing the table of tolls for boomage and prescribing the mode of recovery and the right of disposing of the lumber of any person who defaults in payment of boomage, but not so as to interfere with anyone who lawfully establishes a boom; regulating the operation of sluices and the conveyance of timber, logs and lumber on any river or brook within the bounds of the municipality; regulating the use and management of docks, wharves, landings and cranes except those belonging to Her Majesty; respecting the cutting of ice on lakes and rivers; preserving the banks of rivers; prohibiting the speeding or unsafe operation of motor boats on lakes or rivers over which the legislature has authority; regulating the use of and protecting drains, sewers or watercourses and imposing charges for the use of drains or sewers; regulating, prohibiting and licensing the digging of wells.¹³⁶

Sewers

When a municipality has a sewer or drainage system the council or an authorized committee may make resolutions or by-laws. A by-law may order the owner of any building, not more than sixty feet from the sewer line, to connect the drain with the sewer line. The council may exempt from this rule any building which it feels is adequately served with sewer and drainage, or would not be adequately served by connection with the municipality's sewer line. Where an order to connect is made or where the building is connected to a sewer, the council may require owners of outhouses and septic tanks to destroy them.¹³⁷

Municipal Affairs Act

The Municipal Affairs Act¹³⁸ enables all cities (except Halifax), towns and municipalities to borrow money for certain purposes provided the borrowing is approved by the Minister and by a vote of the ratepayers. The City of Halifax may borrow from time to time for the purposes set out in the Act as the City Council finds necessary. All cities, incorporated towns, municipalities and commissions may borrow money for all matters concerning sewers or drains, and the machinery or plants requisite for them, including maintenance. They may also borrow in like manner for waterworks or a water system. Every city and town may borrow for draining streets, roads, bridges, culverts or retaining walls and the proper implements and plant deemed necessary. With the approval of the Minister of Highways, municipalities may borrow for constructing gutters and rebuilding bridges or culverts.

Municipal Services Act

The Municipal Services Act deals, *inter alia*, with fire protection and annual debt charges for maintaining, constructing, or improving waterworks or water systems and public sewers and drains.¹³⁹ The Lieutenant-Governor in Council may make regulations prescribing a standard program of services to be provided by

136. *Ibid.*, s. 191(26), (37), (40), (43), (54), (83), (89).

137. *Ibid.*, s. 203(1)(a), (b).

138. R.S.N.S., 1967, c. 193, ss. 1(j), 5(c), (d), (f), 6(f), (g), (h), 9(1)(c), (d), (g).

139. R.S.N.S., 1967, c. 203, s. 3(b), (e) (i), (ii).

municipal units, for devising a way of determining the maximum cost for each service annually towards which the Minister may make grants, and determining the proportion that the Minister will pay.¹⁴⁰ The Minister is to pay annual grants to each municipal unit to assist in providing improved municipal services.¹⁴¹

Town Planning Act

The Town Planning Act provides for the creation of town planning boards, which may prescribe regulations respecting subdivisions of land within its jurisdiction. These may include regulations respecting the provision of sewers and other utilities, requiring a subdivider to install water and sewer services before a subdivision is approved and to enter into a bond to install water and sewer services.¹⁴²

There are special provisions respecting the Halifax-Dartmouth and County Regional Planning Commission. Under these a town planning board should not report on, approve, adopt, amend or vary any application for the subdivision of land (or the alteration of the subdivision) in excess of one acre, or plans for the extension or reduction in any water supply line or sewer line in excess of one hundred feet, or plans for any additional water supply source or sewer outfall at tide water, or the building of any sewage treatment facilities until such applications are presented to the Commission for its consideration.¹⁴³ Until plans are presented to the Commission for consideration it is forbidden to extend or reduce a water supply or sewer line in excess of one hundred feet within the regional area, or acquire any additional water supply source or any sewer outfall at tide water or build any sewage treatment facilities within the regional area.¹⁴⁴

Towns Act

A town council may lay out, build, maintain and improve all such drains, sewers and watercourses as the council deems necessary or expedient.¹⁴⁵ It may also acquire any existing sewers subject to the payment of compensation to anyone whose rights may be affected.¹⁴⁶ When a council deems it necessary to construct sewers or drains on a person's land, it may after notice to the owner or occupier enter into and do all that is necessary to build or repair the sewer or drain thereon. A council may authorize any person to construct a sewer or drain and in that case the Act applies to the construction unless the council otherwise provides in the authorization. A sewer or drain must not be less than four feet below the surface of the ground and be suitably covered.¹⁴⁷ When a town has acquired a sewer or drainage system the council, or a committee authorized by it, may make a resolution or by-law ordering the owner of every building within sixty feet of the sewer line to construct a drain and connect it with the sewer line, but the council may exempt any building it feels is adequately served with sewer and drainage or would not be adequately served by such a connection. When the

140. *Ibid.*, s. 2

141. *Ibid.*, s. 4(1).

142. R.S.N.S., 1967, c. 308, s. 28(9)(c), (d)(i), (ii).

143. *Ibid.*, s. 53(1)(a), (c), (d).

144. *Ibid.*, s. 54(1)(a), (b).

145. Towns Act, R.S.N.S., 1967, c. 309, s. 174(1).

146. *Ibid.*, s. 174(2).

147. *Ibid.*, s. 175(1), (2), (3).

owners of outhouses and septic tanks have been ordered to connect their building with the sewer, or when their building is so connected, a resolution or by-law may be passed requiring the outhouses or septic tanks to be destroyed. An order made under this section must be obeyed within thirty days.¹⁴⁸ A town may also make by-laws for the regulation or protection of drains, sewers and watercourses in the town; imposing fees for drain and sewer frontages or for connecting with any sewer or for use of drains or sewers; regulating, prohibiting or licensing the digging or sinking of wells; respecting ice cutting in lakes and rivers; and preserving river banks.¹⁴⁹

With the consent of the Minister of Municipal Affairs a town may extend its public sewers and drains outside its limits into any municipality other than a city or another town. The town may set charges, as for similar services inside the town, and in the case of a water system according to rates set by the Board of Public Utilities.¹⁵⁰

Village Service Act

The Village Service Act applies to any village whose population exceeds one hundred persons.¹⁵¹ The commissioners of the village may do all things necessary or incidental to constructing, altering, improving or maintaining sewers, drains and ditches, and a waterworks or water system within and without the boundaries of the village.¹⁵² When the commissioners have acquired a sewer or drainage system they may make by-laws requiring owners of buildings to connect with it, or to destroy outhouses or septic tanks, or exempt owners of buildings from connecting with a public sewer.¹⁵³ The commissioners may also make by-laws for regulating or protecting drains, sewers or watercourses in the village. And with the general approval of the council of the municipality they may fix and enforce payment of charges for drains and sewers.¹⁵⁴

Private Acts Respecting Municipal Structure

Local Acts have given various cities, towns and municipalities power to supply themselves with water and sewage works and make regulations respecting these works.¹⁵⁵ These will not be discussed in detail, but a few provisions may be set forth. Usually a board or commission is set up to regulate the use and supply of water, and the appropriate powers are delegated to them. Some cities, for example Halifax¹⁵⁶ and Bridgewater,¹⁵⁷ have a separate corporation dealing with these matters. Powers under these Acts include rights of entry and expropriation of land. These local Acts reinforce the rules set out in the public statutes, specifically providing for the protection and regulation of the use

148. *Ibid.*, s. 176(1) (a) (i), (ii), (b), (2).

149. *Ibid.*, s. 221(5) (a), (c), (36), (37), (60).

150. *Ibid.*, s. 116(1), (2).

151. Village Service Act, R.S.N.S., 1967, c. 329, s. 2.

152. *Ibid.*, s. 38(1) (c), (d).

153. *Ibid.*, s. 39(1), (a), (b), (c).

154. *Ibid.*, s. 42(1).

155. See the Nova Scotia statutes respecting domestic uses of water discussed at pp. 301-4. [For Dartmouth, see also Addendum, p. 505].

156. (1944), 8 Geo. VI, c. 47, as amended by (1964), 13 Eliz. II, c. 73 (N.S.). [See also Addendum, p. 505].

157. (1948), 12 Geo. VI, c. 109 (N.S.).

of water. Anything that might impair the quality of the water for use for domestic purposes such as ice cutting, hauling wood, fishing and bathing is forbidden.¹⁵⁸ No building or structure may be erected on any part of the watershed of a lake which is used for domestic supply. Penalties are provided to prevent waste or improper use. Often there is a provision that the city water supply be cleaned or treated chemically by the Board of Health. In Halifax, the police and the police court have the same jurisdiction over any land forming part of the watershed of any lake being part of the water supply of the city, as if it were in the city.¹⁵⁹ In the case of sewers the council, or board or commission, vested with the authority to make rules and regulations, may require compulsory connection to public sewers, removal of outhouses and septic tanks, and prescribe the method of installing a sewer or drain and how connections are to be made. These special Acts provide for discharge of sewers, drains and private connections, setting charges, and rights to enter land. Penalties are set out for allowing water to run from one's land or dwelling house, yard or premises through any sidewalks, street or gutter. They generally contain a clause which prohibits a suit for damages against the town because of any deposit left on the land, whether public or private, providing public health and convenience are not disregarded. Provision is made for the discharge of sewers into tidal water and harbours either below low or high water.

Other Acts Affecting Waters in Municipalities

A number of statutes affect water in municipalities in addition to the general municipal statutes already discussed.

The Ditches and Water Courses Act¹⁶⁰ applies to municipalities and incorporated towns and relates to deepening or widening any ditch or drain. Where owners of adjoining lands would be benefitted by the construction or enlargement of ditches or drains, each owner is to share in a fair proportion in doing so. There must be a proper outlet so that no land will be overflowed without the consent of the owner. Each owner is required to keep up his portion in proper repair.¹⁶¹ Where there is a dispute as to proportions, proceedings are provided to settle it by sections 5 and 6. There is also provision for opening a ditch across the land of a person not interested.¹⁶² Every municipality has all the rights conferred by this Act to an individual owner.¹⁶³ Drains must be constructed so as not to impede the free flow of water.¹⁶⁴ Where it is found necessary to continue a drain through another municipality the engineer is given full power to do so.¹⁶⁵ This Act is discussed in Chapter Twenty-one.

Under the Ferries Act the council of each municipality may establish ferries over harbours, bays, rivers and creeks within the municipality. The council may grant licences to ferrymen subject to such regulations and at such rates as it may

158. (1963), 12 Eliz. II, c. 55, s. 26 (N.S.).

159. (1923), 13 Geo. V, c. 69, s. 16 (N.S.).

160. R.S.N.S., 1967, c. 78.

161. *Ibid.*, s. 4(1), (2), (3).

162. *Ibid.*, s. 9.

163. *Ibid.*, s. 20.

164. *Ibid.*, s. 24.

165. *Ibid.*, s. 26.

establish.¹⁶⁶ There are a number of ferries already mentioned over which the Lieutenant-Governor in Council has jurisdiction.¹⁶⁷ These, of course, fall outside municipal jurisdiction.

Finally, under the Wharves and Public Landings Act, the council of every municipality has control of all public wharves and landings in the municipality that fall under provincial legislative control.¹⁶⁸

166. R.S.N.S., 1967, c. 105, s. 1.

167. *Ibid.*, s. 5(1), (2).

168. R.S.N.S., 1967, c. 338, s. 1.

CHAPTER SIX

Newfoundland Administrative Powers

By William H. Charles

PROVINCIAL STRUCTURE

Department of Economic Development

The most comprehensive control over water and water resources in the Province of Newfoundland rests with the Newfoundland and Labrador Water Authority, a corporation created by the Water Resources and Pollution Control Act¹ and responsible to the Minister of Economic Development, whose department, by virtue of the Department of Economic Development Act,² has general responsibility for the promotion, utilization and conservation of provincial natural resources for purposes of economic development. The Minister and his department are also charged with the administration of several other Acts, such as the Newfoundland and Labrador Power Commission Act,³ the Rural Electrification Act,⁴ and the Newfoundland and Labrador Rural Electricity Act,⁵ all of which play an important part in the control and administration of Newfoundland's water resources and will be discussed separately.

Control of all surface, ground and shore waters, as well as pollution control and the right to allocate the use of waters within the province, is, with some exceptions, vested by the Water Resources and Pollution Control Act in the Water Authority.⁶ Property in, as well as rights to the use and flow of all water in Newfoundland and Labrador, are vested in Her Majesty by the Act.⁷ The Minister is charged by the Act with the conservation, control, improvement and proper utilization of the water resources of the provinces.⁸ Part of this function involves cooperation with other government agencies at all levels, the gathering of information and the submission of recommendations.⁹ In addition, the Act confers upon the Minister power to inspect, regulate and control bodies of water

1. 1966-7, No. 57, s. 4 (Nfld.). [This Act has now been replaced by the Clean Air, Water and Soil Authority Act, which so far as water is concerned is largely a re-enactment; for the changes effected, see Addendum, pp. 505-6].

2. R.S.N., 1952, c. 20, as amended (Nfld.). [Now the Minister of Mines, Agriculture and Resources; see Addendum, p. 505].

3. 1965, No. 20, as amended (Nfld.).

4. 1963, No. 27, as amended (Nfld.).

5. 1965, No. 51, as amended (Nfld.).

6. 1966-7, No. 57, s. 17 (Nfld.). [This is now vested directly in the Minister of Mines, Agriculture and Resources; see Addendum, p. 505].

7. *Ibid.*, s. 11(2).

8. *Ibid.*, s. 18(a).

9. *Ibid.*, ss. 18(a), 19, 20.

for household, industrial, commercial, irrigation or recreational purposes.¹⁰ The Minister also exercises effective control over the activities of the Water Authority by virtue of his required approval of staff appointments and budget proposals.¹¹

The Water Authority consists of three to five members who are appointed for a term prescribed by the Lieutenant-Governor in Council and is responsible to the Minister of Economic Development.¹² The Water Resources and Pollution Control Act also permits the Lieutenant-Governor in Council to appoint an Advisory Board consisting of at least ten and not more than fifteen members, including representatives from the Departments of Mines, Agriculture and Resources, Municipal Affairs, Health, Fisheries, and Highways, as well as the Newfoundland and Labrador Confederation of Municipalities. The Lieutenant-Governor in Council may also appoint Local Advisory Boards for specified areas of the province or designate an existing board, commission or other body as a Local Advisory Board.¹³

The Lieutenant-Governor in Council is empowered to select a Chairman of the Water Authority who is the Chief Executive Officer of the Authority and as such is charged with the general direction, supervision and control of the corporation.¹⁴ If the Minister approves, the Authority may establish other offices and agencies in the province and may appoint a staff.¹⁵ The Water Authority as an agent of Her Majesty may enter into contracts with other persons as well as with Her Majesty.¹⁶ The corporation is also empowered to acquire, dispose of, and otherwise deal with property of all kinds in its own name.¹⁷

In addition to its general control over provincial waters the Authority has specific powers over municipal corporations. For example, any municipality, authority, or person contemplating the establishment of waterworks or the extension or change of any existing waterworks is required to submit information concerning the change to the Water Authority, and may not undertake the construction until the proposed works have been approved in writing by the Minister of Economic Development and the Minister of Health.¹⁸ Similar provisions apply to the establishment or extension of sewer facilities.¹⁹ The construction of hydroelectric projects by a municipal body or other persons is controlled in a similar way. The Act requires that plans and other information relating to a proposed hydroelectric project, control dam, water diversion, drainage diversion, or any alteration of a body of water or of water flow must be submitted to the Water Authority and written approval for the projected works obtained from the Minister of Economic Development before the project is commenced.²⁰

10. *Ibid.*, s. 20(1)(b).

11. *Ibid.*, ss. 13, 14, 35.

12. *Ibid.*, ss. 3, 4(2). [The Clean Air, Water and Soil Authority membership appears in the Addendum, at p. 505; the responsible Minister is now the Minister of Mines, Agriculture and Resources; see Addendum, p. 505].

13. *Ibid.*, s. 5. [See now the Advisory Commission on Environmental Quality, described in the Addendum, p. 505].

14. *Ibid.*, ss. 4(3), 8.

15. *Ibid.*, ss. 13(2), 14.

16. *Ibid.*, ss. 11(1), 3.

17. *Ibid.*, s. 11(2).

18. *Ibid.*, s. 22. [The approvals here are now by the Minister of Mines, Agriculture and Resources alone; see Addendum, p. 505].

19. *Ibid.*, s. 24.

20. *Ibid.*, s. 27.

Provisions of the statute concerning pollution require municipalities and other persons to obtain written approval of either the Minister or the Minister of Health before discharging any material that might cause pollution into a body of water.²¹ The Authority is also authorized to define and prescribe an area surrounding any source of water supply, and the municipal authority or any person operating a waterworks and using water from a particular source is required to protect the source of the public water supply and give notice of the area thus defined.²²

Department of Health

Although the Water Resources and Pollution Control Act contains the most embracing provisions relating to the ownership and use of waters, including pollution control, other statutes contain provisions affecting water, particularly in relation to pollution and sewage facilities. The most important of these is the Waters Protection Act,²³ which gives the Minister of Health broad powers over all inland waters, whether standing, running or below ground, for the purpose of keeping them fit for drinking and domestic purposes and free from any condition that might be injurious to the public health.²⁴ Under the statute he may examine water and land on private property and take samples of water.²⁵

In addition to the Waters Protection Act, the Minister is also responsible for the administration of several other statutes that give him further control over waters in the province. For example, the Health and Public Welfare Act,²⁶ the Department of Health Act²⁷ and the Water Resources and Pollution Control Act²⁸ all contain provisions relating to sanitation and pollution. The Department of Health Act empowers the Minister to declare by order any area within or without a municipality to be a restricted area and to control issuance of permits for the construction of sewage facilities, in spite of the provisions of the Local Government Act which normally confers this power on municipal councils.²⁹ The Act also empowers the making of regulations controlling the construction of sewers and the pollution of waters.³⁰

Department of Labrador Affairs

The Department of Labrador Affairs³¹ is responsible for all matters relating to Labrador, over which the legislature has jurisdiction, that have not been assigned by law to any other department of the government of Newfoundland. It is also specifically concerned with the development of natural resources. The Act directs the Minister to undertake, promote, assist and recommend measures for the speedy development of Labrador's natural resources, and authorizes him to formulate plans for the conservation and development of the natural resources of

21. *Ibid.*, s. 25.

22. *Ibid.*, s. 26.

23. 1964, No. 36 (Nfld.). [For a recent amendment, see Addendum, p. 507].

24. *Ibid.*, s. 2.

25. *Ibid.*, s. 3.

26. R.S.N., 1952, c. 51, as amended.

27. 1965, No. 32, s. 12B, as enacted by 1966, No. 73, s. 7 (Nfld.).

28. 1966-7, No. 57, ss. 22, 24 (Nfld.).

29. 1965, No. 32, s. 12B, as enacted by 1966, No. 73, s. 7 (Nfld.).

30. *Ibid.*, s. 12E(1)(s).

31. 1966, No. 43 (Nfld.).

the area.³² Water resources are not specifically mentioned, but would be included as one of the natural resources.

Department of Mines, Agriculture and Resources

The Department of Mines, Agriculture and Resources³³ also has a general and extensive control over natural resources as well as a specific concern with mines, minerals, quarries, beaches and agriculture. Again, there is no specific reference to water or water resources in the Act that establishes the department, although there is a specific reference to minerals and forest resources.³⁴ The Minister is given general control, regulation, management and supervision of the natural resources of the province³⁵ and is authorized to formulate plans for the conservation, development and improvement of the resources.³⁶

The department is divided into a Mines Branch, an Agriculture and Co-operative Branch, and a Resources Branch.³⁷ The Minister has the control and management of all lands belonging to Her Majesty in right of Newfoundland, except lands specifically under the control and management of another Minister, department or agency of the government of Newfoundland.³⁸

In addition to the powers over water conferred by the Department of Mines, Agriculture and Resources Act, the Minister is also charged with the administration of the Crown Lands Act,³⁹ the Crown Lands (Mines and Quarries) Act,⁴⁰ the Wildlife Act,⁴¹ the Provincial Parks Act⁴² and the Newfoundland and Labrador Power Commission (Water Power) Act,⁴³ all of which contain provisions affecting water.

The Crown Lands Act authorizes the Lieutenant-Governor in Council to grant leases or licences of Crown Lands, including the foreshore, seashore or public waters and lands under them in certain cases.⁴⁴ He is also empowered to lease any water power for a term of years, subject to whatever rents and conditions he may wish to impose.⁴⁵ The Act contains provisions relating to other uses of water which will be discussed in Chapter Fifteen.

The Crown Lands (Mines and Quarries) Act restricts prospecting or searching for materials on any land on which any spring, reservoir, dam or water-works is located except with the consent in writing of the owner of the land or upon an order made by the Lieutenant-Governor in Council.⁴⁶ Other provisions regulate the removal of sand, gravel or clay from beaches⁴⁷ and the construction of

32. *Ibid.*, s. 8(a).

33. 1961, No. 16 (Nfld.). [See also, Addendum, pp. 505-7].

34. *Ibid.*, s. 7(a).

35. *Ibid.*, s. 7(a)(vii).

36. *Ibid.*, s. 14.

37. *Ibid.*, s. 4(1).

38. *Ibid.*, s. 10.

39. R.S.N., 1952, c. 174, as amended.

40. 1961, No. 1, as amended (Nfld.).

41. R.S.N., 1952, c. 197, as amended.

42. R.S.N., 1952, c. 49, as amended.

43. 1965, No. 20, as amended (Nfld.).

44. R.S.N., 1952, c. 174, s. 13.

45. *Ibid.*, s. 28.

46. 1961, No. 1, s. 9 (Nfld.).

47. *Ibid.*, s. 88. [See also Addendum, pp. 506-7].

buildings by the holder of a development licence or mining lease in connection with a location under water, if there is interference with the rights of the proprietor of adjoining land.⁴⁸

The Wild Life Act gives the Minister power to deal with the pollution or obstruction of non-tidal waters frequented by fish.⁴⁹

Under the Provincial Parks Act, the Minister is empowered to control and manage the parks and permitted to expropriate land for the parks.⁵⁰ The Act authorizes the Lieutenant-Governor in Council to pass regulations for the care, preservation and improvement of watercourses, lakes and other things in provincial parks.⁵¹

Department of Community and Social Development

The Department of Community and Social Development Act⁵² permits the Minister to co-operate with the federal government and other federal bodies in carrying out programs designed to develop and conserve water supplied for agricultural purposes in Newfoundland.

Department of Highways

The Department of Highways Act⁵³ contains several specific references to water. The Minister of Highways is authorized to control the flow of water under a highway where it crosses a natural drainage course, and is not responsible to adjoining landowners or occupiers for any damage to their land caused by a more concentrated flow of water to the land.⁵⁴ It also permits the Minister to provide as many drains as he considers desirable to the adjoining land without, in any case, rendering himself liable to maintain or keep them in repair.⁵⁵ The Act also deals with the obstruction of highways and drainage facilities, and prohibits the flow of water onto a highway by adjoining landowners or occupiers.⁵⁶

Department of Municipal Affairs

Under the Department of Municipal Affairs Act,⁵⁷ the Minister of Municipal Affairs is given powers and duties relating to municipal affairs: local government, housing, and urban and rural planning and development generally. Although the Minister is not given any powers directly affecting water or water rights by that Act, he is charged with the administration of several Acts that do contain powers relating to water. The Housing Act,⁵⁸ the Newfoundland and Labrador Housing Corporation Act,⁵⁹ the Urban and Rural Planning Act⁶⁰ and the Building

48. *Ibid.*, s. 64.

49. R.S.N., 1952, c. 197, s. 5(1)(g).

50. R.S.N., 1952, No. 49, ss. 5, 8.

51. *Ibid.*, s. 9.

52. 1966, No. 42, s. 8 (Nfld.).

53. 1966, No. 13, as amended (Nfld.).

54. *Ibid.*, s. 52.

55. *Ibid.*

56. *Ibid.*, ss. 30, 31, 33.

57. 1966-7, No. 3, s. 8, as amended (Nfld.).

58. 1966, No. 87, ss. 3(1)(h), 17(e) (Nfld.).

59. 1966-7, No. 47, s. 25(i) (Nfld.). The Housing Authority is given power to acquire land by section 25(g) of the Act. Land is defined to include waters, water rights, water powers and water privileges.

60. 1965, No. 28, ss. 57(f), (g), 11(2)(b), 341(2)(b) (Nfld.).

Standards Act⁶¹ all contain provisions relating to the construction of waterworks, sewage facilities and the protection of water supply.

The Housing Act of 1966 provides that, subject to the approval of the Lieutenant-Governor in Council, the Minister or a municipal authority appointed by the Lieutenant-Governor in Council, may undertake housing projects alone, or make agreements with the federal government, a municipal authority or a private individual or firm, and provide works for the supply of water and the disposal of sewage.⁶²

The Urban and Rural Planning Act permits the Minister to define the area to be covered by a municipal plan and to include in it land outside the municipality if the Minister thinks it necessary to enable the municipality or municipal council to control watersheds for the purpose of municipal water supply.⁶³ He is also concerned with the physical development of urban and rural areas, and particularly with sewage disposal facilities and water supply needs. He is authorized to request the Provincial Planning Board to recommend a local area plan that will take into consideration sewage disposal and water requirements. The Urban and Rural Planning Act also provides for the creation of regional planning areas controlled by a regional plan which can provide for pollution and flooding as well as sewage disposal and water supply facilities.⁶⁴

Under the Corner Brook Housing Corporation Act,⁶⁵ the Minister is charged with general control of that corporation, which in turn is given the power to construct viaducts, sewers, waterlines, gutters and drains in the City of Corner Brook and adjacent areas deemed to be part of the city for the purposes of the Act.⁶⁶

The Building Standards Act,⁶⁷ with which the Minister is also concerned, applies to all the province except the City of St. John's, areas held or administered by the St. John's Municipal Council, and subject to section 5(2), towns, rural districts or local governments districts established under the Local Government Act and any area constituted as a city or municipality by special statute.⁶⁸ Under the Building Standards Act, the Lieutenant-Governor in Council may make regulations concerning water supply and drainage in buildings that are to be erected.⁶⁹ He may also require the owner of land to remove or destroy any building, structure, object or material situated on land or do any act he considers necessary in the interest of health or safety or for the protection of rivers, brooks, streams, lakes or ponds and, in the event that the owner does not comply, to take the required action.⁷⁰

The Local Government Act⁷¹ and the Community Councils Act⁷² give municipalities general control over the construction of sewage facilities and water supply

61. 1955, No. 38, ss. 2, 3 (Nfld.).

62. 1966, No. 87, s. 3(1), (2) (Nfld.).

63. 1965, No. 28, s. 11 (Nfld.).

64. *Ibid.*, s. 57.

65. 1965, No. 62 (Nfld.).

66. *Ibid.*, s. 15(f).

67. 1955, No. 38, ss. 2, 3 (Nfld.).

68. *Ibid.*, s. 2.

69. *Ibid.*, s. 3(1)(a).

70. *Ibid.*, s. 3(1)(e).

71. 1966, No. 31, ss. 66, 69 (Nfld.).

72. 1962, No. 1, as amended (Nfld.).

facilities as well as drainage and pollution. The powers given to municipalities under these statutes are subject to the overriding control of the Water Authority under the Water Resources and Pollution Control Act.⁷³

Department of Public Works

The Department of Public Works Act gives the Minister control and regulation of any property belonging to Her Majesty in right of Newfoundland, including works and properties that have been acquired, constructed, enlarged or repaired at the expense of the province or have been acquired or constructed with public funds.⁷⁴ Works assigned under any other Act to another Minister or department are excepted. The Minister is given power to acquire by purchase, lease or otherwise, any real or other property he deems necessary for any public work, or for a purpose connected with, or relating to, any public work or to any department. He is authorized to hold, manage and develop the property.⁷⁵ The Act does not define what is meant by the words "property" or "land", and so could include water rights that are acquired and deemed necessary for any public work or purposes connected with or relating to any public work or any department. The Act provides that the Lieutenant-Governor in Council may, by order, declare an area of land to be a public works development area and provides for the acquisition of the land by expropriation.⁷⁶

Electric Power Commissions and Companies

The Newfoundland and Labrador Power Commission Act

The most important general statutes relating to power commissions in the province are the Newfoundland and Labrador Power Commission Act of 1965⁷⁷ and the Newfoundland and Labrador Power Commission (Water Power) Act of the same year.⁷⁸ The former statute reconstitutes as a corporate body the Newfoundland Power Commission, which was originally created in 1954.⁷⁹ This Commission is authorized by the statute to establish, construct, maintain and operate works in any part of the province for the development and generation of power from water power, peat, gas or oil, or by any other means, and is given authority to transmit and sell anywhere in the province all the power generated.⁸⁰ The Commission is also granted, subject to the rights of any person existing immediately before the passing of the Act, the exclusive right and franchise to sell in the first instance, either for consumption or resale, all power generated by the Commission, and to develop, generate and sell in the first instance, either for consumption or for resale, all the power developed after the passing of this Act from any new hydroelectric sites on the Island of Newfoundland.⁸¹

73. 1966-7, No. 57, ss. 22, 24, 25, 26, 27 (Nfld.).

74. 1957, No. 8, s. 7(1)(a), as amended by 1962, No. 10, s. 2 (Nfld.).

75. *Ibid.*, s. 18.

76. *Ibid.*, ss. 18 A-H, as enacted by 1966, No. 65 (Nfld.).

77. 1965, No. 20, as amended (Nfld.).

78. 1965, No. 21 (Nfld.).

79. 1965, No. 20, s. 4 (Nfld.).

80. *Ibid.*, s. 11.

81. *Ibid.*, s. 12.

The statute creates the Newfoundland Power Commission as an agent of Her Majesty and confers upon it powers similar to those granted to the Water Authority in so far as contractual relations and the acquisition of property are concerned.⁸² The powers and duties of the Commission are exercised by a Board known as the Board of Commissioners, consisting of not less than three and not more than seven members appointed by the Lieutenant-Governor in Council.⁸³

Subject to the prior approval of the Lieutenant-Governor in Council, the Commission may acquire by purchase, lease, expropriation or otherwise any land, water, water privileges, or water rights, water powers, easements, privileges and proprietary rights of every description, and works required by the Board for the purposes of the Commission.⁸⁴ Expropriation rights are restricted to the Island of Newfoundland and adjacent islands and are not to be exercised in Labrador.⁸⁵ The Act exempts the Commission from the provisions of the Public Utilities Act and sections 29 to 49 of the Crown Lands Act in so far as they apply to any lease or licence of water power issued under the Crown Lands Act to the Commission.⁸⁶

The Commission may, in connection with the Bay d'Espoir Project, request grants of land or water power rights from the Lieutenant-Governor in Council who is authorized to obtain them from Crown holdings or from private owners by purchase, expropriation or otherwise.⁸⁷ The Lieutenant-Governor in Council also has authority by order to divest the Commission of the title to all properties and discharge the Commission from all liabilities that, in his opinion, relate to the distribution of power in rural areas or that are not related to the development and transmission of power at the Bay d'Espoir Project in the province.⁸⁸

The Newfoundland and Labrador Power Commission (Water Power) Act

The Newfoundland and Labrador Power Commission (Water Power) Act⁸⁹ assures the Commission of certain water power rights in an area covered by the Bay d'Espoir Water Project⁹⁰ and grants it an option to take assurances of other water power rights in the Island of Newfoundland that are required to complete the financing of the project.⁹¹ The Act provides that certain rights to water power and certain options held by the British Newfoundland Corporation Limited, the Southern Newfoundland Power and Development, Limited, the Bowater Power Company, Limited, and the Anglo Newfoundland Development Company, Limited are completely and forever extinguished and barred, and for the purposes of the Act are deemed to be vested in Her Majesty in the right of the province.⁹² Compensation is to be paid in accordance with the agreements concluded with the

82. *Ibid.*, s. 5.

83. *Ibid.*, s. 6.

84. *Ibid.*, s. 13.

85. *Ibid.*, s. 32.

86. *Ibid.*, s. 33.

87. *Ibid.*, s. 34.

88. *Ibid.*, s. 36.

89. 1965, No. 21 (Nfld.).

90. *Ibid.*, ss. 3, 4.

91. *Ibid.*, s. 11.

91. *Ibid.*, s. 11.

92. *Ibid.*, s. 4.

companies concerned. The Newfoundland and Labrador Power Commission is also granted an option, exercisable at any time during a twenty-five year period commencing with the date of the coming into force of the Act or while any bonds or debentures guaranteed by the province are outstanding, to take an exclusive right and concession to harness and make use of all the rivers, streams, waterways and watersheds in the area described in the schedule to the Act, and to be vested with all the hydroelectric and hydraulic power rights concerned. The Power Commission is also granted a similar option respecting any other water power rights in the Island of Newfoundland outside the area required for the Bay d'Espoir Project that have previously been granted to parties other than the Newfoundland and Labrador Power Commission when these rights revert to Her Majesty. Any rights granted outside the project area are not to be inconsistent with any grant or lease of power rights already granted or agreed to be granted by the Lieutenant-Governor in Council or otherwise on behalf of Her Majesty in the right of the province or, pursuant to any statute, to any other person.⁹³

If the Commission elects to exercise its option and gives notice in writing to the Minister, the Lieutenant-Governor in Council is to assure the Commission a lease of the rights to harness and make use of the waters for a term of not less than the term for which the British Newfoundland Corporation (Brinco) was entitled to take an exclusive right and concession to harness and make use of water power in the Island of Newfoundland.⁹⁴

Where the right to make use of water power, located in the Island of Newfoundland but outside the area described in the schedule to the Act, has been granted or agreed to be granted to any person, but has been subordinated to the British Newfoundland Corporation Limited under the Brinco agreement, the right granted to such persons is also subordinated to the right granted to the Commission by the Act.⁹⁵

Private Acts and Agreements

The Newfoundland and Labrador Power Commission Act gives the Commission the sole and exclusive right and franchise to sell all power generated by the Commission and to develop, generate and sell in the first instance, either for consumption or resale, all the power developed after the enactment of the Act at any new hydroelectric sites in the Island of Newfoundland, but subject to the rights of any person existing immediately before the enactment of the Act.⁹⁶

Before the passing of that Act there were several electric light companies authorized by statute for specific periods to use certain waters to generate electric power. In many cases the lease period seems to have expired, but where it has not, the companies have the right to continue operations at existing sites. These statutes and agreements are dealt with in Chapter Fifteen.

93. *Ibid.*, s. 11.

94. *Ibid.*, s. 11(2). The Brinco Agreement is found in the Schedule to the Act and constitutes a contract entered into between the Government of Newfoundland and the British Newfoundland Corporation and H. M. Rothschild & Sons; see 1953, No. 63, as amended by supplementary agreements, 1954, No. 18, 1955, No. 48 and 1964, No. 44 (Nfld.).

95. *Ibid.*, s. 12.

96. 1965, No. 20, s. 12 (Nfld.).

In addition to electric light companies, there are a number of private Acts (also dealt with in Chapter Fifteen) incorporating private agreements under which mining companies have been authorized to develop water power, if required, for mining operations. In most cases, the agreements provide for the withdrawal of a certain area from the provisions and operation of the Crown Lands (Mines and Quarries) Act for a period of time. In Labrador this is governed by the Labrador Lands (Reservation) Act.⁹⁷ During this period the company concerned may ask for a development licence, which would be good for, say, five years, and would give them exclusive water power rights to a particular body of water. While the development licence was in effect, the mining company could ask for a mining lease of all or part of the licensed area and if the conditions in the licence were fulfilled they would get a lease complete with water power rights. This licence or lease would be issued under, and subject to the terms and conditions set out in, the Crown Lands (Mines and Quarries) Act but the lease might be for an undetermined number of years. For this reason it is difficult, when examining the private Acts and the agreements with private companies, to determine whether or not there might still be leases that have not expired. The agreements do not indicate the bodies of water to which the rights are attached although this information may be contained in the lease or licence.

Other Acts Respecting Power Development

In addition to the statutory powers granted to electric light and mining companies, there are several other statutes relating to power development in Newfoundland. The Rural Electrification Act of 1963 provides that every Board of Trustees controlling a Power Distribution District authorized by the Act may acquire by purchase, lease, expropriation or otherwise any land, waters, water power, water privileges and works developed, used or adopted for generating electricity or for the transmission of it to, or in its district,⁹⁸ and subject to section 12 of Newfoundland and Labrador Power Commission Act,⁹⁹ may construct, maintain and operate generating plants.¹⁰⁰ The Federal Provincial Power Act, 1962, provides that the Lieutenant-Governor in Council may authorize the Premier, or other designated Minister, or the Newfoundland Power Commission, or any two or more of them, to enter into an agreement with the federal government or the government of another province or any private company that operates a plant for the production, transmission, delivery or furnishing of electric power or energy, concerning the financing, construction, administration or operation of plants or transmission facilities for the generation, furnishing, transmission, distribution, delivery, supply or sale of electric power or energy.¹⁰¹ The Act also validates all agreements previously entered into. The Water Resources and Pollution Control Act also contains provisions relating to hydro-electric projects.¹⁰²

97. R.S.N., 1952, c. 176, as amended by 1959, No. 27 (Nfld.).

98. 1963, No. 27, s. 10(c), as amended by 1966, No. 8, s. 3 (Nfld.).

99. 1965, No. 20 (Nfld.).

100. 1969, No. 18 (Nfld.).

101. 1962, No. 15, s. 2 (Nfld.).

102. 1966-7, No. 57, ss. 21, 27 (Nfld.).

Expropriation

Many of the statutes relating to water and the control of water contain expropriation provisions of various kinds. The importance to the private individual of these provisions justifies brief treatment as a separate topic. Some of these statutes provide for expropriation pursuant to the Public Utilities (Acquisition of Lands) Act,¹⁰³ others refer to expropriation pursuant to the Expropriation Act,¹⁰⁴ and still others have their own particular system. The Newfoundland and Labrador Power Commission Act¹⁰⁵ and the Rural Electrification Act¹⁰⁶ provide for expropriation pursuant to the Public Utilities (Acquisition of Lands) Act. The Department of Public Works Act,¹⁰⁷ the National Parks Act,¹⁰⁸ the Housing Act,¹⁰⁹ and the Newfoundland and Labrador Housing Corporation Act¹¹⁰ provide for expropriation pursuant to the Expropriation Act. The Urban and Rural Planning Act,¹¹¹ on the other hand, provides its own scheme of expropriation as does the Crown Lands Act,¹¹² the Local Government Act,¹¹³ the Provincial Parks Act,¹¹⁴ the Newfoundland and Labrador Power Commission (Water Power) Act,¹¹⁵ the Water and Sewerage Corporation of Greater Cornerbrook¹¹⁶ and the St. John's Housing Corporation (Lands) Act.¹¹⁷

Many of the statutes relating to water resources contain a general clause giving the power to acquire property by purchase, lease *or otherwise* without expressly referring to expropriation. These include the following: the Department of Public Works Act,¹¹⁸ the Department of Community and Social Development Act,¹¹⁹ the Department of Highways Act,¹²⁰ the Department of Labrador Affairs,¹²¹ the Department of Mines, Agriculture and Resources Act,¹²² the Department of Municipal Affairs Act,¹²³ the Water Resources and Pollution Control Act,¹²⁴ and the Newfoundland and Labrador Housing Corporation Act.¹²⁵ These statutes present some problems of interpretation. The courts might apply the *ejusdem generis* rule and interpret "otherwise" as indicating some form of acquisition on a voluntary basis on the part of the transferor of the property and thereby rule out expropriation under the Expropriation Act or any other Act. This is all the more

103. R.S.N., 1952, c. 250, as amended.

104. 1964, No. 31, as amended (Nfld.).

105. 1965, No. 20, s. 14 (Nfld.).

106. 1963, No. 27, s. 26 (Nfld.).

107. 1957, No. 8, as enacted by 1966, No. 65, s. 4 (Nfld.).

108. R.S.N., 1952, c. 50, s. 2 (Nfld.).

109. 1966, No. 8, s. 22(3) (Nfld.).

110. 1966-7, No. 47, s. 14 (Nfld.).

111. 1965, No. 28, ss. 76 *et seq* (Nfld.).

112. R.S.N., 1952, c. 174, ss. 103-7, and 42(4) (Nfld.).

113. 1966, No. 31, Part VII (Nfld.).

114. R.S.N., 1952, c. 49, s. 8 (Nfld.).

115. 1965, No. 21, s. 7 (Nfld.).

116. 1951, No. 79, s. 30, as amended (Nfld.).

117. R.S.N., 1952, c. 81, ss. 4, 6-11 (Nfld.).

118. 1957, No. 8, s. 18 (Nfld.).

119. 1966, No. 42, s. 22 (Nfld.).

120. 1966, No. 13, s. 18 (Nfld.).

121. 1966, No. 43, s. 22(1) (Nfld.).

122. 1961, No. 16, s. 2(1) (Nfld.).

123. 1966-7, No. 3, s. 28 (Nfld.).

124. 1966-7, No. 57, s. 16(a) (Nfld.).

125. 1966-7, No. 47, s. 25(g) (Nfld.).

likely because the Acts interfere with private rights. Still, these statutes being concerned with public undertakings, it is conceivable, if not probable, that they could be considered as falling within the provisions of the Expropriation Act permitting expropriation for the use of Her Majesty for any purpose, whether specified in the Expropriation Act or not.¹²⁶ However, it is probable that expropriation under these Acts may be made under the provisions of the Expropriation Act.

Turning to the statutes expressly referring to expropriation, there are important differences between the Expropriation Act¹²⁷ and the Public Utilities (Acquisition of Lands) Act¹²⁸ in relation to compensation. These Acts must, therefore, be compared.

The Expropriation Act provides that compensation is to be fixed by a Board of Arbitrators. The Board is directed to pay compensation based on the fair market value of the land and on the existing use value at the time of the commencement of expropriation proceedings and, although a separate amount may be granted for injurious affection, this factor is not to be taken into consideration in calculating the basic amount of compensation to be paid.¹²⁹ The fair market value of the land is declared to be the amount that the land, if sold on the open market by a willing seller, might be expected to realize, but the Act authorizes the Board to consider all terms and assessments of capital value for taxation made or acquiesced in by the owner of the land. Any special suitability or adaptability of the land for any purpose is not to be taken into account if that purpose is one to which the land could be applied only in pursuance of statutory powers or as one for which there is no market apart from the special needs of a particular purchaser or requirements for which the land is expropriated. However, the board must take into account any *bona fide* offer for the purchase of the land made before the commencement of the expropriation proceedings.¹³⁰

The Board is also directed to take into account any advantage the owner might derive directly or indirectly from the contemplated work and operations for which the land is expropriated and to reduce the amount of compensation thereby. Where the land is, and but for the expropriation, would continue to be, devoted to a purpose for which there is no general demand or market for the land for that purpose, the amount of the compensation may, if the board is satisfied that reinstatement in some other place is *bona fide* intended, be assessed on the basis of the reasonable cost of equivalent reinstatement.¹³¹ The Board is also given the power in certain circumstances, if it deems appropriate, to indemnify the owner of the expropriated land by giving him a portion of adjoining land belonging to the Minister if the Minister consents.¹³²

The Public Utilities (Acquisition of Lands) Act, on the other hand, provides that public utilities may petition the Board of Commissioners of Public Utilities for expropriation of property and the petition must show the amount the public

126. 1964, No. 31, s. 3(M) (Nfld.).

127. *Ibid.*, as amended by 1966-7, No. 35 (Nfld.).

128. R.S.N., 1952, c. 250, as amended.

129. 1964, No. 31, s. 27(1)(a), (2) (Nfld.).

130. *Ibid.*, s. 27(1)(b), (c).

131. *Ibid.*, s. 27(1)(d).

132. *Ibid.*, s. 30(1).

utility has offered to pay the owners of the land.¹³³ The Board hears all interested parties and if it is satisfied that the property to be expropriated is necessary and not more extensive than needed by the Board, it assesses the amount of money to be paid. There is no criterion, as there is in the Expropriation Act, as to how the value of the property is to be assessed. The Act does stipulate, however, that no order of the Public Utilities Board will be valid in connection with property valued at more than \$5,000 unless the Lieutenant-Governor in Council approves.¹³⁴ There is an appeal to the Supreme Court on any question of law or fact, and the Board may at any stage transfer the proceedings to the District Court in the district in which the lands affected are situated.

It should be noted that, unlike the Expropriation Act, there is no specific provision for compensation for injurious affection. The Act provides that a public utility may by its servants or agents enter upon land for the purposes of preliminary surveys and examinations without liability other than for actual damage.¹³⁵ As already mentioned, there are no criteria to determine how compensation is to be calculated.

Several statutes contain their own expropriation procedures. That in the Urban and Rural Planning Act¹³⁶ is quite similar to that of the Expropriation Act. It provides for compensation to be paid for expropriation and injurious affection to land.¹³⁷ The compensation is to be calculated by a Board of Arbitrators consisting of a chairman and two other arbitrators. The Minister of Municipal Affairs is authorized to appoint a chairman of the Board and another arbitrator, and the owner of the land appoints a third. The rules for assessing compensation are almost exactly the same as those in the Expropriation Act and specifically limit any actual or anticipated loss, damage or inconvenience suffered by any person to that resulting from the development of any land or the erection of any building or the doing of anything that is not developed in accordance with a municipal plan, joint municipal plan, local area plan, regional plan or other related scheme or plan related to it and made under the Act.¹³⁸

The Crown Lands Act¹³⁹ contains several provisions relating to water power licences and acquisition of rights on private land. Section 42(4) authorizes the Lieutenant-Governor in Council to refuse to renew a water power licence and to take possession of the works, providing the licensee is compensated. The Act provides that compensation is to be paid on the basis of the value of the undertaking as a going concern.¹⁴⁰ If the parties are unable to agree on the amount of compensation, the matter can be referred to arbitration.¹⁴¹ It further provides for the Lieutenant-Governor in Council to appoint one arbitrator, the licensee to appoint another, and then the two arbitrators to appoint a third. The decision of two arbitrators is to be final. If the parties refuse to appoint an arbitrator, the Supreme Court, or a judge thereof, may, upon application by either party, appoint

133. R.S.N., 1952, c. 250, s. 3.

134. *Ibid.*, s. 5.

135. *Ibid.*, s. 6.

136. 1965, No. 28, Part IX (Nfld.).

137. *Ibid.*, s. 89.

138. *Ibid.*, s. 91.

139. R.S.N., 1952, c. 174, as amended.

140. *Ibid.*, s. 42(6).

141. *Ibid.*, s. 42(7).

an arbitrator.¹⁴² The Act provides that the provisions of the Judicature Act relating to arbitration apply. The Judicature Act does not indicate what factors are to be considered in determining compensation. The only guide to compensation is therefore the reference to the undertaking as a going concern at the time of the expropriation. Section 103 of the Crown Lands Act also provides for the acquisition of rights on private land for the purpose of opening up tunnels or shafts or doing other things incidental to the working of a submarine mining location covered by the sea or public tidal water. Again there is no provision regarding the manner in which compensation is to be calculated.

The Local Government Act¹⁴³ authorizes municipal councils to acquire and take possession of any waters required to provide a sufficient supply of water and to acquire by purchase, expropriation or otherwise any private lands around the water supply area to prevent pollution.¹⁴⁴ In addition, the municipality may take possession of any drain, sewer or water supply pipes, machinery and plant construction by any person.¹⁴⁵ In all cases, compensation is to be paid, but the Act does not establish a criterion to determine the amount of compensation beyond the declaration that any advantage likely to accrue to the owner directly or indirectly from the contemplated work must be taken into consideration by the Board of Assessors and the award reduced accordingly.¹⁴⁶

The Provincial Parks Act¹⁴⁷ gives authority to expropriate to the Lieutenant-Governor in Council. The Act provides that if the parties cannot agree on the amount of compensation, it is to be determined by a Board of Assessors consisting of three persons. The chairman of the Board is to be appointed by the Minister, one member by the owner, and a third member by agreement between the chairman and the owner. There is no criterion in the Act for the payment of compensation; nor is there any reference to compensation for injurious affection.

The Newfoundland and Labrador Power Commission (Water Power) Act¹⁴⁸ stipulates that if a person, other than the companies provided for in the statute, claims compensation for a right extinguished by the Act and if that person cannot reach an agreement regarding compensation with the Minister, or for other reasons enumerated in the Act, the Lieutenant-Governor in Council may fix the amount of compensation, and this decision is final.

The Water and Sewerage Corporation of Greater Corner Brook Act¹⁴⁹ permits expropriation of water and sewage facilities as well as lands and timber required to prevent pollution of water sources. The Act provides that compensation for water and sewage works is to be calculated on the basis of the actual value of the work at the time of expropriation based on their replacement costs, allowing for depreciation but omitting an allowance for good will. The Act also provides for the taking of lands and timber, and provides for compensation which includes not only the value of the lands and timber but also any loss or damage suffered

142. *Ibid.*, s. 42(8).

143. 1966, No. 31, ss. 66-9 (Nfld.).

144. *Ibid.*, s. 69(b), (c).

145. *Ibid.*, s. 66(2).

146. *Ibid.*, s. 130(1).

147. R.S.N., 1952, c. 49, s. 8 (Nfld.).

148. 1965, No. 21, ss. 6, 7 (Nfld.).

149. 1951, No. 79, ss. 30, 35, 37 (Nfld.).

by the owner in connection with expenditures made for construction, equipment and placing works and equipment for the cutting, removal and shipping of the timber.

When the Corporation has to expropriate land for waterworks facilities, catchment areas or sewage disposal works or has to divert and expropriate any natural or artificial body of water, it is urged to pay the owner reasonable compensation for the lands or privileges taken. In case of disagreement, compensation is to be awarded by a Board of five arbitrators.

The St. John's Housing Corporation, which has the power to acquire lands by purchase or otherwise, and is empowered to construct sewers, viaducts, water pipe lines and drains, as well as to widen, deepen, alter the course of, or drain, increase or decrease the flow of water through or otherwise alter, any brook or stream within the housing area,¹⁵⁰ is also empowered by the St. John's Housing Corporation (Lands) Act¹⁵¹ to expropriate lands within the housing area, and to construct and maintain water and sewer pipes outside the area. Compensation is to be paid to any owner outside the housing area whose land is injuriously affected by the actions of the Corporation and is to be assessed by a board of three arbitrators. In all cases, compensation is determined in accordance with detailed criteria set out as the second schedule to the Act. The Board of Arbitrators is directed to take into account any advantage that the owner will be likely to derive from the contemplated work of the Corporation.¹⁵²

MUNICIPAL STRUCTURE

General

For the purpose of local government, Newfoundland is divided into municipalities, communities and local improvement districts. A municipality may consist of an area comprising a town and governed by a town council or it may consist of any area encompassing a rural district and governed by a rural district council. A third area, designated as a local district council and managed by a board of trustees, is treated as a municipality and is subject to the provisions of the Local Government Act.¹⁵³ The St. John's Metropolitan Area¹⁵⁴ and the Harmon Corporation Area,¹⁵⁵ both of which were the subjects of special Acts of incorporation, are also treated as local improvement districts.

The majority of municipalities (whether towns or rural districts) are governed, generally, by the Local Government Act and are affected by the provisions in that Act relating to water and water resources. However, there are a few areas that are regulated by special statutes, such as the City of St. John's,¹⁵⁶ the City of Corner Brook,¹⁵⁷ and the Rural District of Placentia.¹⁵⁸

150. R.S.N., 1952, c. 80, ss. 8(a), (c), 18 (Nfld.).

151. R.S.N., 1952, c. 81 (Nfld.).

152. *Ibid.*, s. 6.

153. 1966, No. 31, as amended by 1966-7, No. 15 (Nfld.).

154. 1963, No. 72 (Nfld.).

155. 1966-7, No. 25 (Nfld.).

156. R.S.N., 1952, c. 87, as amended.

157. 1968, No. 37, as amended (Nfld.).

158. 1945, No. 44, as amended (Nfld.).

The establishment of communities is controlled by the Community Councils Act,¹⁵⁹ which provides for the government of the communities by community councils, but permits a community to be changed into a municipality and *vice versa*, if desired. In the same way a local improvement district may also become a municipality.

Subject to the control exercised by the Water Authority pursuant to the Water Resources and Pollution Control Act,¹⁶⁰ municipalities are given control over the construction of sewers and water supply systems.¹⁶¹ They can acquire possession of existing privately owned sewer and water pipes and may enter private property to carry out the work of supplying water, sewage or drainage. This power also includes the power to enter private property and to dig trenches in order to lay pipes.

Municipal councils may also, with the written approval of the Minister of Economic Development, alter or divert any watercourse within the municipality to improve the watercourses or the water supply or the sewage of the municipality and may remove impure offensive soil, lay pipes, construct dams, grade surrounding land and change the direction of, or fill up, the watercourse if the council deems necessary or expedient.¹⁶² Councils may, for these purposes, enter any land, dig and excavate on it, and go into all buildings and require the owner to make alterations in the walls, cellars and other portions.¹⁶³

The Local Government Act also provides that, with the approval of the Minister of Municipal Affairs and subject to the Waters Protection Act, 1964, a municipal council may acquire or establish and operate (a) a public water supply system for the distribution of water within or outside the municipality, or (b) a public sewage system within or outside the municipality.¹⁶⁴ Subject to existing rights, the municipality may acquire and take possession of any waters required to provide a sufficient supply of water for public purposes. A municipality is also given power to take possession and control of Crown lands and to acquire by purchase, expropriation or otherwise any private lands surrounding any of the waters to the extent of the watershed in order to prevent pollution of the waters.

Councils may make regulations to prevent the pollution of any waters either inside or outside the municipality if they are being used as a water supply.¹⁶⁵ They may also be required by the Water Authority to define and prescribe an area surrounding a source of public water supply, give notice of its existence, and protect it. In addition, municipal councils may, pursuant to the Local Government Act, pass regulations that prohibit and control the cutting of timber or erection of any building or structure upon, in, over, or under any land or water within the watershed of any water supply area, whether the watershed is wholly

159. 1962, No. 1, as amended (Nfld.).

160. 1966-7, No. 57, ss. 22, 24 (Nfld.). [See now the Clean Air, Water and Soil Authority Act in the Addendum, pp. 505-6.].

161. 1962, No. 1, ss. 6(2), (6) (Nfld.).

162. 1966-7, No. 57, s. 27 (Nfld.).

163. 1962, No. 1, s. 68(2) (Nfld.).

164. *Ibid.*, s. 69.

165. *Ibid.*, s. 69.

or partially within or outside the limits of the municipality. The regulations do not apply to any area held or occupied by any person engaged in the manufacture of pulp and paper or in any logging operation. Municipal councils are empowered to make regulations for the protection of drains and sewers and for the control of indoor and outdoor toilet facilities. They may pass regulations governing the digging and construction of wells and sources of water supply for domestic use and may prohibit the use of water from any natural source which they may think dangerous to the public health. They may prohibit the construction, maintenance and use of ditches, drains or culverts as well as the obstruction or littering of any watercourse and may prohibit the discharge and disposal of ballast in all waters under the control of the council. All of this is subject to the overriding power of the Minister of Health to pass regulations dealing with the construction of sewers, and pollution.¹⁶⁶

Community councils are given all the powers and privileges, other than the power of taxation, that a municipality has, and they are charged, like a municipality, with the maintenance of drainage services, water supply and sewage facilities, and the production and distribution of electricity.¹⁶⁷

The City of Corner Brook

Water and sewage facilities for the City of Corner Brook and surrounding area are supplied by the Water and Sewerage Corporation of Greater Corner Brook.¹⁶⁸ This corporation services the towns of Corner Brook West, Corner Brook, Corner Brook East, and Curling. To accomplish its purposes the corporation is given extensive powers over water in the areas and their pollution.¹⁶⁹

The Act provides that the authority given the corporation does not apply to any grant, lease or licence given by the government to Bowaters Newfoundland Pulp and Paper Mill, Limited or its predecessors in title.¹⁷⁰ Nor may the corporation interfere with the supply of water at or above the Three Mile dam to Bowaters or interfere with the water supply of the company which may adversely affect the supply of either water or electricity to the mills of the company.¹⁷¹

The City of St. John's Act

The City of St. John's by statute is given specific powers to develop and maintain waterworks and sewage facilities within the city.¹⁷² Control of natural streams and watercourses within the city, as well as other specified bodies of water, is conferred upon the City Council, as well as the right to divert watercourses and power to prevent pollution of waters in the watershed area within which the water supply is located.¹⁷³

166. Waters Protection Act, 1964, No. 36, s. 2 (Nfld.).

167. 1962, No. 1 (Nfld.).

168. 1951, No. 79, as amended (Nfld.).

169. *Ibid.*, see, for example, ss. 33, 34, 37, 38.

170. *Ibid.*, s. 94(1).

171. *Ibid.*, s. 94(3).

172. R.S.N., 1952, c. 87, ss. 103, 582, as amended.

173. *Ibid.*, ss. 96(5), 105.

The Rural District of Placentia Act, 1945

Under the original Act of 1945,¹⁷⁴ besides the usual provisions concerning drains, waterworks and sewers, the Council of the Rural District of Placentia was given possession and control of the ponds or lakes from which the supply of water for the rural district was obtained and of the Crown lands surrounding and adjoining these waters to a three hundred yard limit in order to prevent pollution.¹⁷⁵ In 1953, possession and control of the ponds or lakes from which the water supply was derived was given to the Lieutenant-Governor in Council with power to allocate to any public authority an amount of water from the ponds or lakes he thinks might be required by the authority as well as the right to install pipelines and other works in the watershed.¹⁷⁶ The power to pass regulations was also given. The Lieutenant-Governor in Council was given power to transfer, to a public authority having jurisdiction in all the areas supplied with water from the ponds or lakes, all the rights conferred on him. Under a 1956 statute the Town Council of Placentia was given possession and control of Larkin's Pond Reservoir with power to enter into agreements with authorities in the leased areas for a supply of water from Larkin's Pond.¹⁷⁷ The Lieutenant-Governor in Council retains the power to allocate water to other municipalities and may make regulations to control pollution. He may, in addition, add lakes, ponds, rivers and Crown lands he thinks are necessary to provide an adequate water supply of pure water to the municipalities in the leased areas.¹⁷⁸

Miscellaneous Provisions

All of the powers relating to water conferred by special statute upon the cities of Corner Brook and St. John's as well as the rural district of Placentia are now, of course, subject to the general supervisory control exercised by the Water Authority.¹⁷⁹

In addition to the provisions of the Local Government Act, the Community Councils Act, the special statutes incorporating the cities of St. John's and Corner Brook and the Rural District of Placentia in which specific rights over water are conferred, there are a variety of special Acts incorporating water and sewage companies that also confer water rights. However, it is not clear whether, and to what extent, these are still operative. Many of the statutes still seem to be in existence, although the rights to water given for a specific time have expired. Some, although not granting an express right to build dams, seem to do so by implication. Where the periods during which the rights granted to build dams or to exercise control over specific bodies of water have not expired, any attempt to exercise the rights conferred would be subject to the Water Resources and Pollution Control Act and regulation by the Water Authority. The right obtained by these entities will be examined in dealing with specific uses of water in Chapter Fifteen.

174. 1945, No. 44 (Nfld.).

175. *Ibid.*, s. 68.

176. 1953, No. 5, s. 2 (Nfld.).

177. Larkin's Pond Reservoir Act, 1956, No. 34 (Nfld.).

178. *Ibid.*, s. 4(2).

179. Water Resources and Pollution Control Act, 1966-7, No. 57 (Nfld.).

PART III

Rivers, Streams and Lakes

CHAPTER SEVEN

Introductory

By Gerard V. La Forest

GENERAL

The common law envisages water as a common resource not susceptible of private ownership. This approach is buttressed by doctrines giving the public generally certain rights to use the water for the purposes of trade, the public right of navigation and, in Canada, the public right of floating lumber and other goods on streams. A further public right is that of fishing in tidal waters which was perhaps the most reasonable way of sharing a resource that might well have seemed to be inexhaustible.

But in an age when administrative organization was rudimentary, the institution of private property was perhaps the most convenient method of making use of, and allocating resources, including water flowing in streams and other bodies of water. Accordingly the owners of the land through or along which water flows were given the exclusive right to use the water, subject, however, to the duty of returning it to the stream substantially undiminished in quantity and quality (except where the use was for all important, but relatively limited, domestic purposes). Thus the maximum use of the water could be obtained while assuring its preservation and quality by imposing responsibility for doing so on those who had access to it.

Other rules were aimed at developing resources closely associated with the stream. Thus an adjoining landowner's right of access to water ensured the fullest use of his land, and the right of accretion gave new formed land to the only person who could conveniently use it—the adjoining owner.

In simpler times, these various doctrines proved to be most effective instruments to ensure the full development and preservation of water as well as lands associated with it. This is the context in which one must approach the law if its underlying principles are to be understood. But technological advances made irrelevant many of the underlying policies on which the doctrines were based. Maximum use of water resources now requires projects substantially altering the flow of streams. Minor adjustments to the common law were made to meet these new realities but the law was now too settled to be substantially altered judicially. Moreover, there is considerable merit to the view that persons acquiring rights of property on the basis of expectations about the future interpretation of those rights

should not have these expectations disappointed except by the elected representatives of the people. Finally, the courts may have felt that new situations raised by particular projects and the basis of compensation were not susceptible, at least in the short run, of solution by general principles.

In any event, it was the legislatures that undertook the task of making the law conform to changing needs. For many years this was done *ad hoc* by enacting empowering Acts as occasion required when industrial and other projects were desired. But the general effect of these statutes was to destroy the vitality of many parts of the common law. For example, if a pulp mill company was authorized to pollute water upstream, there was often little point in a lower riparian owner bringing an action to prevent another upstream owner from polluting the stream, even though the lower riparian owner has a right to do so, because the river was polluted in any event. In more recent years there has been a tendency to transfer to administrative bodies, such as water authorities, power to prevent pollution and to make allocations of water resources. But despite the many new statutory schemes, the common law remains as a background and continues to be applied except as modified by statute.

THE NATURE OF A WATERCOURSE

The most obvious feature of a watercourse, such as a river, stream, lake or pond, is that it consists of water flowing in a fairly regular manner in a channel between banks that are more or less defined. For most purposes, of course, it is not necessary to frame a definition of a watercourse with any degree of precision. But there are marginal cases where this becomes necessary. For there is a marked distinction between the common law principles applicable to watercourses and those applicable to surface and ground waters, those accumulations and flows of water not sufficiently large, defined or permanent to constitute a watercourse. Since, however, problems of distinguishing between these two types of water are more frequently associated with other problems relating to surface and ground waters, detailed examination of the distinction will be made in dealing with those waters. It may be useful, however, to set forth the description of a watercourse given by Bain J. in the Manitoba case of *Wilton v. Murray*¹ which sets forth most of the salient features of a watercourse. His definition reads:

A watercourse has been defined to consist of bed, banks and water; and while the flow of water need not be continuous or constant, the beds and banks must be defined and distinct enough to form a channel or course that can be seen as a permanent landmark on the ground.

The foregoing refers to natural watercourses. In most cases, the law relating to natural watercourses does not apply to artificial watercourses, but where an artificial watercourse has been constructed with a view to becoming a permanent waterway that law will be applied. This, too, is discussed with more particularity in relation to surface waters.² It might be added, however, that there are *dicta* in

1. (1897), 12 Man. R. 35, at p. 38.

2. See Chapter Eighteen.

*Fenerty v. City of Halifax*³ to the effect that if water is added to a natural stream by artificial means it becomes subject to the same rights as the rest of the water in the stream.

Underground streams are generally subject to the same law as watercourses on the surface, but there are serious difficulties in establishing that subterranean waters are, in fact, underground streams. This is discussed in detail in connection with ground waters.⁴

CLASSIFICATION

The rights relating to streams, lakes and other bodies of water at common law may be divided under three heads:

- (1) public rights;
- (2) riparian rights;
- (3) rights associated with the ownership of the bed.

To each of these a chapter will be devoted, after which the modifications made by statute will be examined.

3. (1920), 53 N.S.R. 457.

4. See Chapter Nineteen.

CHAPTER EIGHT

Public Rights

By Gerard V. La Forest

CLASSIFICATION

At common law a number of public rights exist in rivers, streams and lakes. By public rights are not meant rights owned by government, whether federal, provincial or municipal. These bodies may own land and water rights, including riparian rights and rights associated with the ownership of the beds of water-courses, in the same way as private individuals, in which case they are, in a manner of speaking, public rights. But what is here called public rights are those vested in the public generally, rights that any member of the public may enjoy. There are three such public rights:

- (a) the right of navigation;
- (b) the right of floatability; and
- (c) the right of fishing.

Each of these must be examined in turn. And first, of navigation.

THE PUBLIC RIGHT OF NAVIGATION

Must Waters be Tidal?

In England the public has a natural right to navigate in tidal waters, but though non-tidal streams may be *de facto* navigable the public has no right to navigate on them, except as authorized by statute or immemorial custom or unless the owner of the bed has dedicated the stream or other body of water as a highway.¹ New Brunswick² and Nova Scotia³ courts have for long assumed that the rule is the same there, but the point never appears to have been squarely raised. In Quebec⁴, Ontario⁵, the Prairie Provinces⁶, and British Columbia⁷, the rule is

1. *Caldwell v. McLaren* (1884), 9 A.C. 392; see also *Reg. v. Robertson* (1882), 6 S.C.R. 52.
2. See *Robertson v. Steadman* (1876), 16 N.B.R. 612; *Steadman v. Robertson*; *Hanson v. Robertson* (1879), 18 N.B.R. 580; *Reg. v. Robertson* (1882), 6 S.C.R. 52, *per* Ritchie C.J. (but *cf.* Strong J.); *Boyd v. Fudge* (1965), 46 D.L.R. (2d) 679.
3. See *McNeil v. Jones* (1894), 26 N.S.R. 299.
4. See, *inter alia*, *In re Provincial Fisheries* (1895), 26 S.C.R. 444.
5. See, *inter alia*, *Parker v. Elliott* (1852), 1 U.C.C.P. 470; *Reg. v. Meyers* (1853), 3 U.C.C.P. 305; *Gage v. Bates* (1858), 7 U.C.C.P. 116; *Dixon v. Snetsinger* (1872), 23 U.C.C.P. 235; *Reg. v. Robertson* (1882), 6 S.C.R. 52; *In re Provincial Fisheries* (1895), 26 S.C.R. 444.
6. See *Re Iverson and Greater Winnipeg Water District* (1921), 57 D.L.R. 184; *Flewelling v. Johnston* (1921), 59 D.L.R. 419.
7. *Fort George Lumber Co. v. Grand Trunk Pacific Ry.* (1915), 24 D.L.R. 527.

that if waters are *de facto* navigable, the public right of navigation exists there, whether the waters are tidal or non-tidal.

Several explanations have been offered for this variation from the English common law. Some judges have suggested that at the Conquest, the British sovereign acquired the same rights to the lands ceded as were possessed by the French King, and since under French law the right of the public to navigate is determined by whether waters are *de facto* navigable, then the waters of Canada are navigable by the public if navigable in fact, whether they are tidal or not.⁸ There are several difficulties to this theory, notably that it is difficult to draw an exact line between French and British possessions before the Conquest and no attempt to make such a distinction has been made by the courts. A second theory is that the Crown's opening of the country to settlers carried with it the right to navigate lakes and streams, since this was virtually the only mode of transport.⁹ The root of the right under this theory is sometimes found in the Royal Proclamation of 1763 in which the British Government made provision for the government of the newly acquired territory,¹⁰ but this proclamation was not applicable to the Atlantic Provinces.¹¹ The most satisfactory explanation for this departure from the English Common Law is that the variation was required to meet the needs and conditions of the colonies.¹²

Whatever the theory may be it is firmly settled that from Quebec westward, if waters are in fact navigable, the public has a right to navigate on them. Such a rule is there required, for the English rule is wholly inapplicable to the situation and conditions of these areas, many of which are thousands of miles from the sea. The maritime location of the Atlantic Provinces, however, is not unlike that in England, and in New Brunswick, particularly, the judicial authorities have relied on the English rule. Still, there are *dicta* in early cases in the Supreme Court of Canada that the rule of *de facto* navigability applies in the Maritime Provinces as well as the other provinces.¹³ Moreover, early New Brunswick cases developing the public right to float spoke of non-tidal floatable rivers as being navigable, though non-tidal,¹⁴ and these cases served in developing the rule of *de facto* navigability in Ontario.¹⁵ It is possible, therefore, that the rule applied in other parts of Canada may be adopted in the Atlantic region. There may, however, be little practical difference in most of the Atlantic region between the two approaches, for the bulk of waters in the region that are capable of navigation are tidal. However,

8. *Reg. v. Meyers* (1853), 3 U.C.C.P. 305; *Dixon v. Snetsinger* (1872), 23 U.C.C.P. 235; *In re Provincial Fisheries* (1895), 26 S.C.R. 444.

9. *Reg. v. Meyers* (1853), 3 U.C.C.P. 305; *Fort George Lumber Co. v. Grand Trunk Pacific Ry.* (1915), 24 D.L.R. 527.

10. *Fort George Lumber Co. v. Grand Trunk Pacific Ry.* (1915), 24 D.L.R. 527.

11. See *Doe d. Burk v. Cormier* (1891), 30 N.B.R. 142; cf. *Warman v. Francis* (1960), 20 D.L.R. (2d) 627; see La Forest, *Natural Resources and Public Property Under the Canadian Constitution* (Toronto, 1969), pp. 125-26.

12. *In re Provincial Fisheries* (1895), 26 S.C.R. 444; see also *Keewatin Power Co. v. Town of Kenora* (1906), 13 O.L.R. 237; reversed: (1908), 16 O.L.R. 184, but see *Fares v. R.*, [1932] S.C.R. 78, per Anglin C.J.; see La Forest, *ibid.*

13. *Reg. v. Robertson* (1882), 6 S.C.R. 52; *In re Provincial Fisheries* (1895), 26 S.C.R. 444.

14. *Esson v. McMaster* (1842), 3 N.B.R. 501; *Rowe v. Titus* (1894), 6 N.B.R. 326.

15. See *Reg. v. Meyers* (1853), 3 U.C.C.P. 305; *Keewatin Power Co. v. Town of Kenora* (1906), 13 O.L.R. 237; reversed: (1908), 16 O.L.R. 184, but see *Fares v. R.*, [1932] S.C.R. 78, per Anglin C.J.

there are some waters in New Brunswick capable of being navigated, for example the Saint John River above Fredericton, whose level is not affected by the fluctuations of the tide.

Navigable Waters

Whether or not water must be tidal to be open to navigation by the public, it is not sufficient to give the public the right of navigation that the waters be tidal. Whatever test is adopted, the waters must be navigable in fact,¹⁶ though there is a *prima facie* presumption that if water is tidal it is navigable, a presumption that may, however, be rebutted¹⁷. The question whether water is *de facto* navigable is one of fact to be determined by an examination of all the circumstances of the case.¹⁸ Ordinarily this poses no serious problem,¹⁹ but in marginal cases it is a most difficult question and various criteria, sometimes conflicting, have been employed to determine it. Thus in *Reg. v. Meyers*,²⁰ Macaulay C.J. stated that the adaptability of a stream for purposes of navigation and not its actual use for navigation determines whether a river is navigable. On the other hand, in *Attorney-General of Quebec v. Fraser*²¹ (a Quebec case but often referred to in common law cases)²² Girouard J. doubted whether the size of boats capable of navigating in the waters in question had much to do with the question, and gave the impression that so long as it was actually navigated by boats, even very small ones, for commercial purposes, this was enough to establish navigability. In truth both tests may be valid. A river capable of carrying large vessels would normally be held to be a navigable river even though not used for navigation, while one capable of carrying small craft only but regularly used for trade might well be held navigable, though a similar river not used for commerce would not be. As Anglin J. put it in *Keewatin Power Co. v. Kenora*²³ it is not every small creek in which a fishing skiff or gunning canoe can be made to float that is navigable; it must be generally and commonly useful for some purpose of trade or agriculture, either in fact or potentially.

In any event a stream or other body of water may well be navigable for part of its course and not for its whole length; such, for example, is the Miramichi River.²⁴ The mere fact that water is connected with navigable waters, such as a branch of a navigable river, does not make it navigable,²⁵ though it is a factor that

16. *Attorney-General of Quebec v. Hull and Scott* (1904), 34 S.C.R. 603; *McFeeley v. B.C. Electric Ry. Co.* (1917), 37 D.L.R. 686; *Simpson Sand Co. Ltd. v. Black Douglas Contractors Ltd.*, [1964] S.C.R. 333.

17. *McFeeley v. B.C. Electric Ry. Co.* (1917), 37 D.L.R. 686; *Simpson Sand Co. Ltd. v. Black Douglas Contractors Ltd.*, [1964] S.C.R. 333.

18. *Attorney-General of Quebec v. Fraser* (1906), 37 S.C.R. 577; affirmed: *Wyatt v. Attorney-General of Quebec*, [1911] A.C. 489; *Stephens and Mathias v. MacMillan*, [1954] 2 D.L.R. 135; *Simpson Sand Co. Ltd. v. Black Douglas Contractors Ltd.*, [1964] S.C.R. 333.

19. *Reg. v. Meyers* (1853), 3 U.C.C.P. 305.

20. *Ibid.*; see also *Stephens and Mathias v. MacMillan*, [1954] 2 D.L.R. 135.

21. (1906), 37 S.C.R. 577; affirmed: *Wyatt v. Attorney-General of Quebec*, [1911] A.C. 489; see also *Bell v. Corporation of Quebec* (1879), 5 A.C. 84.

22. See *Flewelling v. Johnston* (1921), 59 D.L.R. 419; *Stephens and Mathias v. MacMillan*, [1954] 2 D.L.R. 135; *Gordon v. Hall and Hall* (1959), 16 D.L.R. (2d) 379; *Simpson Sand Co. v. Black Douglas Contractors Ltd.*, [1964] S.C.R. 333; *Boyd v. Fudge* (1965), 46 D.L.R. (2d) 679.

23. (1906), 13 O.L.R. 237; reversed on other grounds: (1908), 16 O.L.R. 184.

24. *Reg. v. Robertson* (1882), 6 S.C.R. 52; see also *Reg. v. Port Perry and Port Whitby Ry.* (1876); 38 U.C.Q.B. 431; *Leamy v. R.* (1916), 54 S.C.R. 143; *Arrow River and Tributaries, Slide and Boom Co. v. Pigeon Timber Co. Ltd.*, [1932] S.C.R. 495.

25. *Attorney-General of Quebec v. Hull and Scott* (1904), 34 S.C.R. 603.

has to be taken into account.²⁶ Thus the whole of a river or lake may be regarded as navigable even though at some point navigation may be impossible or possible only for small craft by reason of rapids or shoals.²⁷ Again a stream may be held to be navigable even though it will only support vessels at high tide or at certain times of the year.²⁸ But this is a question of degree. Thus in *Ross v. Portsmouth*,²⁹ water that was ordinarily quite shallow was held non-navigable even though scows could pass at extraordinary periods when the water would not exceed four or five feet. Similarly water that might support boats only during freshets would not likely be held navigable.³⁰

Since navigability is a question of fact, it would seem to follow that a river may from changes in flow or other causes cease to be navigable;³¹ conversely a stream or other water may become navigable by change of conditions. In fact this is so where navigability is brought about by artificial means. Thus in *Simpson Sand Co. Ltd v. Black Douglas Contractors Ltd.*,³² the defendant's excavation operations to produce sand resulted in the formation of a large bay, some 600 feet deep and 545 feet at its mouth on an island in the St. Lawrence River. Subsequently he began to remove sand from the adjacent lot, but this operation was later discontinued, after which the plaintiff obtained the right to dig sand. In doing so the plaintiff navigated the waters of the first lot to get into the second lot, but the defendant interfered. The plaintiff sued, and the Supreme Court of Canada held that the waters of the first lot had become navigable, and accordingly the plaintiff was entitled to navigate them without interference from the defendant.

In this case, it should be observed, the artificial bay was connected with the St. Lawrence River, and afforded access to other areas where the public was entitled to go. The mere fact that water has been made capable of carrying vessels will not render it navigable for the purposes of the law. To be navigable, water must have the characteristics of a highway, i.e. it must afford a means of transportation between points where members of the public have a right to go as distinct from transportation between one private terminus and another.³³ Thus two ponds in a creek created by artificial means and capable of navigation (and in fact so used by the owner) were held not to be navigable by the public, there being nothing to induce the public to do so, the creek itself not being otherwise navigable.³⁴

26. *Stephens and Mathias v. MacMillan* [1954] 2 D.L.R. 135; see also *Simpson Sand Co. v. Black Douglas Contractors Ltd.*, [1964] S.C.R. 333.

27. *Keewatin Power Co. v. Town of Kenora* (1906), 13 O.L.R. 237; reversed: (1908), 16 O.L.R. 184; but see *Fares v. R.*, [1932] S.C.R. 78; *Stephens and Mathias v. MacMillan*, [1954] 2 D.L.R. 135.

28. *Reg. v. Robertson* (1882), 6 S.C.R. 52; *Attorney-General of Quebec v. Fraser* (1906), 37 S.C.R. 577.

29. (1866), 17 U.C.C.P. 195.

30. See *Whelan v. McLachlan* (1865), 16 U.C.C.P. 102.

31. *Small v. Grand Trunk Ry.* (1857), 15 U.C.Q.B. 283; *Municipality of Queen's County v. Cooper*, [1946] S.C.R. 584, per Kerwin J.

32. [1964] S.C.R. 333; see also *Cram v. Ryan* (1894), 25 O.R. 524.

33. *Gordon v. Hall and Hall* (1959), 16 D.L.R. (2d) 379.

34. *Bak et al v. Ang Yong Huat*, [1923] A.C. 429; see also *Big Point Club v. Lauzon*, [1943] 4 D.L.R. 136.

Navigation

The right of navigation is similar to the public right of passing and repassing on a highway.³⁵ It includes all rights necessary for the full enjoyment of this right of passage, such as the right to pass, to anchor and to moor, and to remain at one place for a reasonable time for loading and unloading.³⁶ But the rights to anchor and to moor must not be taken to give a right to ground on the foreshore when water has receded or to moor at a private dock without the owner's consent.³⁷ Public harbours have been set aside to enable persons navigating to land.³⁸

What amounts to navigation may sometimes give difficulty. Transportation by vessels or boats on navigable waters is obviously navigation, and the floating of logs or rafts would also be comprised in the term navigation,³⁹ though the right of floatability may exist separately in waters not capable of ordinary navigation.⁴⁰ But some situations are more difficult. Thus while an airplane equipped for landing on water is in flight, it is not navigating, even when it is in the course of landing on water, but it does navigate when it has landed on water even though it is not a vessel.⁴¹ Generally, navigation may be defined as relating to floatable things borne on or floating on the surface of water.⁴² But this definition would not include the operation of hovercraft over water which it is suggested must be regarded as navigation. For, as was said by Jasperson M. in *Reg. v. Rice*,⁴³ shipping and navigation must encompass usage in navigation in accordance with the development of water craft. He was there, however, dealing with the constitutional power of the Dominion to legislate respecting navigation and shipping, which is not limited to the regulation of the public right of navigation. In that case he held that anti-noise regulations in respect of outboard motors fell within section 91(10) of the British North America Act.

It must be underlined, however, that the right of passage afforded by the right of navigation does not authorize the doing of acts inconsistent with the rights of the owner of the bed or of other persons except as may be necessary to its exercise. Accordingly, a person navigating a river is not permitted to fish or shoot or cut ice there, for these are rights attached to the ownership of land,⁴⁴ subject to the public right of fishing in tidal waters.⁴⁵ It has also been held that

35. See, *inter alia*, *Byron v. Stimpson* (1878), 17 N.B.R. 697; *McNeil v. Jones* (1894), 26 N.S.R. 299; *Keewatin Power Co. v. Town of Kenora* (1906), 13 O.L.R. 237; reversed on other grounds (1908), 16 O.L.R. 184; *Gordon v. Hall and Hall* (1959), 16 D.L.R. (2d) 379.

36. *Carvell v. City of Charlottetown* (1876), 2 P.E.I. 115; *Quiddy River Boom Co. v. Davidson* (1886), 25 N.B.R. 580; *McNeil v. Jones* (1894), 26 N.S.R. 299; *London v. City of Vancouver* (1934), 49 B.C.R. 328; *Saint John Harbour Commissioners v. Eastern Coal Docks Ltd.* (1935), 8 M.P.R. 499; *Irving Oil Co. v. Rover Shipping Co.* (1961), 45 M.P.R. 311.

37. *Tweedie v. R.* (1915), 52 S.C.R. 197.

38. *City of Vancouver v. C.P.R.* (1894), 23 S.C.R. 1, *per* King J. (Fournier J. concurring).

39. *Crandell v. Mooney* (1873), 23 U.C.C.P. 212; *North West Navigation Co. v. Walker* (1885), 3 Man. R. 25; *Kennedy v. The Surrey* (1905), 10 Ex. C.R. 29; *McNeil v. Jones* (1894), 26 N.S.R. 299.

40. See on the right of floatability, at pp. 191-5.

41. See *Stephens and Mathias v. MacMillan*, [1954] 2 D.L.R. 135.

42. See *McDonald v. Lake Simcoe Ice and Cold Storage Co.* (1889), 26 O.A.R. 411 (reversed on other grounds: (1900), 31 S.C.R. 130); *Stephens and Mathias v. MacMillan*, [1954] 2 D.L.R. 135.

43. [1963] 1 C.C.C. 108.

44. *Re Iverson and Greater Winnipeg Water District* (1921), 57 D.L.R. 184.

45. For the public right of fishing, see pp. 195-9.

the right to use navigable waters as a highway does not give the right to throw poisonous or noxious matter in the water, and accordingly in the absence of authority given by the legislature, a person doing so may be prosecuted for causing a public nuisance or sued by anyone suffering special damage.⁴⁶ In the case in question a distiller of whiskey was forced to destroy whiskey which had been manufactured using the waters of the Bay of Toronto where the defendant had dumped gas tar. The defendant's action was held wrongful, though the plaintiff failed on a technicality.

Passage On or Through Ice

The right of navigation is not extinguished by the formation of ice in winter, though it is, of course, rendered more difficult and sometimes physically impossible. Accordingly, navigation may be carried on by breaking or crushing the ice or cutting a passage through it, even though such ice belongs to the owner of the bed of the water, for the right of navigation is paramount. Moreover, transportation may be carried on over ice formed in navigable waters. Thus a ship denied access to shore by the formation of ice may be unloaded at the outer margin of the ice, and cargo and passengers may be transferred over the ice. The same applies to other floatable goods, such as logs or lumber in the course of transportation, and to ice harvested in a body of water and then transported through or over ice on another person's land. A person exercising such right must, however, do so with due regard for the rights of others. Accordingly if a passage is cut through ice on a person's property for the purposes of transportation, it should be as direct and of no greater width than is reasonably necessary. These propositions were firmly established in the Supreme Court of Canada case of *Lake Simcoe Ice and Coal Storage Co. v. McDonald*.⁴⁷ There the defendant company harvested ice on Lake Simcoe outside of water lots and cut a channel in the ice over water lots belonging to the plaintiff. The plaintiff brought action for interference with his property, but the court by a 3 to 2 majority held for the defendant.

Equally, the public has a right to travel over the ice over navigable waters and to do so in such well marked and beaten ways as is most convenient to them.⁴⁸ Since this is a public right no individual can raise a prescriptive right by exercising it.⁴⁹

It must be emphasized that the public right of passage over ice only exists over navigable waters,⁵⁰ but it may be possible to acquire a prescriptive right to do so if the passage is marked and well defined.⁵¹

Reasonable Exercise of Right

All members of the public have equal rights to navigation, but each must do so in a reasonable manner so as not to interfere with the equal right of others. What is a reasonable use is dependent on all the circumstances of the case. An

46. *Watson v. Toronto Gas-light and Water Co.* (1847), 4 U.C.Q.B. 158.

47. (1900), 31 S.C.R. 130; see also *Cullerton v. Miller* (1894), 26 O.R. 36.

48. *Dinn v. Reg.* (1871), 1 P.E.I. 361; *Carvell v. City of Charlottetown* (1876), 2 P.E.I. 115.

49. *Ibid.*

50. *Dinn v. Reg.* (1871), 1 P.E.I. 361; *Twin City Ice Co. v. City of Ottawa* (1915), 34 O.L.R. 358.

51. See *Dinn v. Reg.* (1871), 1 P.E.I. 361.

excellent statement of the law appears in the Maine case of *Davis v. Winslow*,⁵² which has been cited in several Canadian cases,⁵³ as follows:

What constitutes reasonable use depends upon the circumstances of each particular case; and no positive rule of law can be laid down to define and regulate such use, with entire precision, so various are the subjects and occasions for it, and so diversified the relations of parties therein interested. In determining the question of reasonable use, regard must be had to the subject-matter of the use, the occasion and manner of its application, its object, extent, necessity, and duration, and the established usage of the country. The size of the stream; also, the fall of water, its volume, velocity, and prospective rise or fall, are important elements to be taken into the account. The same promptness and efficiency would not be expected of the owner of logs thrown promiscuously into the stream, in respect to their management, as would be required of a shipmaster in navigating his ship. Every person has an undoubted right to use a public highway, whether upon the land or water, for all legitimate purposes of travel and transportation; and if, in so doing, while in the exercise of ordinary care, he necessarily and unavoidably impede or obstruct another temporarily, he does not thereby become a wrong-doer, his acts are not illegal, and he creates no nuisance for which an action can be maintained.

From this statement, it is evident that in enjoying the right of navigation, it is permissible to interfere to some extent with the rights of navigation of others so long as the interference is reasonable, a question that depends on a consideration of all the circumstances of the case. Indeed, in harbours and other close quarters such interference is inevitable.⁵⁴ Thus in *Hamilton Steamboat Co. v. McKay*,⁵⁵ the plaintiff and defendant owned wharves on opposite sides of a navigable slip of water in a harbour in Hamilton Bay, and the plaintiff sought an injunction to restrain the defendant from moving vessels at his wharf because this interfered with the plaintiff's mooring. The Ontario Court of Appeal dismissed the action since there was nothing unreasonable in the manner in which the defendant moored his vessel. But it is evident that the permanent appropriation of navigable waters—such as by filling it up with logs—is not reasonable having regard to the rights of others, and this is so whether the obstruction is of greater benefit to the public than any other use.⁵⁶ Moreover such an obstruction can never be legitimated, no matter how long it may be continued;⁵⁷ however, long use may be a factor in determining whether it is unreasonable.⁵⁸

An interference does not by any means have to be permanent to be actionable. Thus in *Lunt v. Lloyd*,⁵⁹ where a government dredge lying in the main channel of Bathurst harbour allowed its anchor to lie in the channel with its fluke pointing upwards in such a position and depth that vessels navigating the channel would necessarily be in danger of striking it, the Appeal Division of the Supreme Court of New Brunswick had no difficulty in finding that the owner of a vessel that

52. (1861), 51 Maine 264, at p. 291.

53. *Crandell v. Mooney* (1863), 23 U.C.C.P. 212; *Watson v. Patterson* (1903), 2 N.B. Eq. 488; *Reg. v. Rice*, [1963] 1 C.C.C. 108; see also *Quiddy River Boom Co. v. Davidson* (1886), 25 N.B.R. 580; *Kennedy v. The Surrey* (1905), 10 Ex. C.R. 29.

54. *Hall v. Ewart* (1873), 33 U.C.Q.B. 491; *Graham v. The "E. Mayfield"* (1913), 14 Ex. C.R. 331.

55. (1907), 10 O.W.R. 295.

56. *Kennedy v. The Surrey* (1905), 10 Ex. C.R. 29.

57. *Attorney-General v. Harrison* (1866), 12 Grant 466; see *ibid.*; see also *R. v. Bradburn* (1913), 14 Ex. C.R. 419.

58. *Langstaff v. McRae* (1892), 22 O.R. 78; see also *Kennedy v. The Surrey* (1905), 10 Ex. C.R. 29.

59. (1881), 21 N.B.R. 202.

struck it had a good cause of action. Again in *McNeil v. Jones*⁶⁰ the Supreme Court of Nova Scotia, *en banc*, held that a vessel lying at a wharf is bound to use reasonable exertions to allow another vessel lying on an inside berth to get into the stream when she finishes unloading. So too in *Irving Oil Co. v. Rover Shipping Co.*,⁶¹ where the plaintiff's vessel was unable to reach its wharf because one of the defendant's vessels was berthed at another wharf and left insufficient clearance, the Appeal Division of the Supreme Court of New Brunswick held that the defendant was required to move his vessel to let that of the plaintiff pass.

Several factors must be taken into account, of course, in determining reasonableness. The duration of the interference is one of them.⁶² Knowledge seems to play a role. In *McNeil v. Jones*,⁶³ for example, the court attached some weight to the fact that the defendant had been notified of the interference. Indeed this case may usefully be contrasted with *Hall v. Ewart*.⁶⁴ In that case the plaintiff sued on the ground that while his vessel was lying almost loaded at a wharf near the mouth of a river, the defendant brought his ship into the mouth and the plaintiff was obstructed for three days. The action was dismissed on a number of grounds, but one of them was that before the defendant could be held liable he ought to have been notified. As already noted, all the circumstances have to be taken into consideration. Thus a ship may be so large having regard to the waters it is navigating as to be unreasonable in itself. Here the number of ships that must be disturbed to permit it to go in the water is one of the factors to be taken into account.⁶⁵

Paramountcy of Right

The public right of navigation is a paramount right; whenever it conflicts with the rights of the owner of the bed or of a riparian owner it will prevail.⁶⁶ Even the owner of the bed is not entitled to erect anything thereon that interferes with the public right of navigation.⁶⁷ Thus in *Myrer v. Clish*⁶⁸ the plaintiff was held entitled to maintain an action for special damages accruing to him from the interference to navigation caused by a bridge built over navigable waters under a contract with the provincial government, even though the highway would be more beneficial to the public. Again in *Zwicker v. La Have Steamship Co.*,⁶⁹ the defendant's steamer while using his wharf broke down stakes on the plaintiff's water lot, which were

60. (1894), 26 N.S.R. 299; see also *Bown v. Kavanagh* (1859), 4 Nfld. L.R. 413.

61. (1961), 45 M.P.R. 311.

62. See *McNeil v. Jones* (1854), 26 N.S.R. 299; *Crandell v. Mooney* (1873), 23 U.C.C.P. 212; *Kennedy v. The Surrey* (1905), 10 Ex. C.R. 143.

63. (1894), 26 N.S.R. 299.

64. (1873), 33 U.C.Q.B. 491; see also *North West Navigation Co. v. Walker* (1885), 3 Man. R. 25; *Smith v. Grieve* (1899), 8 Nfld. L.R. 278.

65. *Irving Oil Co. v. Rover Shipping Co.* (1961), 45 N.B.R. 311.

66. *Rowe v. Titus* (1849), 6 N.B.R. 326; *Reg. v. Lord* (1864), 1 P.E.I. 245; *Brown v. Reed* (1874), 15 N.B.R. 206; *Queddy River Driving Boom Co. Ltd. v. Davidson* (1883), 10 S.C.R. 222; *Myrer v. Clish* (1884), 40 N.S.R. 1; *Reg. v. Moss* (1896), 26 S.C.R. 322; *McInley v. Gilley* (1907), 7 W.L.R. 22; *Zwicker v. La Have Steamship Co.* (1911), 9 E.L.R. 114; *City of New Westminster v. S.S. Maagen* (1913), 14 Ex. C.R. 323; *Re Iverson and Greater Winnipeg Water District* (1921), 57 D.L.R. 184; *Saint John Harbour Commissioners v. Eastern Coal Docks, Ltd.* (1935), 8 M.P.R. 499.

67. *Myrer v. Clish* (1884), 40 N.S.R. 1; *Reg. v. Moss* (1896), 26 S.C.R. 322; *Zwicker v. La Have Steamship Co.* (1911), 9 E.L.R. 114.

68. (1884), 40 N.S.R. 1; see also *Snure v. Great Western Ry.* (1884), 13 U.C.Q.B. 376; *S.S. "Eurena" v. Burrard Inlet Tunnel and Bridge Co.*, [1931] A.C. 300.

69. (1911), 9 E.L.R. 114; see also *Wood v. Esson* (1883), 9 S.C.R. 239.

intended to support a wharf being built by the plaintiff. The plaintiff's action for trespass failed since the defendant was properly exercising the right of navigation. The public right of navigation also prevails over the public right of fishing. Thus in *McInsley v. Gilley*,⁷⁰ the defendant's steamer in passing up the Fraser River cut through the plaintiff's fishing nets, but was held not liable for the damages, *inter alia*, on the ground that the right of navigation was paramount. The cases indicate, however, that due care must be exercised in navigating not to cause harm to others.⁷¹

Interferences with the Right

Though the courts have made it clear that the public right of navigation is paramount and prevails over other rights relating to water, some accommodations have been made by requiring, as already seen, that the right must be exercised reasonably. Further accommodation is made by requiring that an obstruction to navigation must be substantial enough to amount to a public nuisance. It is true that in an early Supreme Court of Canada case, the view was expressed that any interference with navigation, even of the slightest degree, constituted a public nuisance, for which the courts would allow an indictment.⁷² This represents an earlier view. It is now doubtful, to say the least, that every structure built in the bed of navigable water that may interfere in some slight degree with navigation is a public nuisance.⁷³ Whether an obstruction constitutes a public nuisance is a question of fact to be determined having regard to all the facts of the particular case.⁷⁴ This gives the courts some scope to make reasonable adjustments when the public right of navigation comes in conflict with other rights. In any event it is clear that not every work placed in navigable waters interferes with navigation.⁷⁵

It should also be noted that an obstruction to navigable waters must be intentional or negligent to make a person liable in the absence of statute; a ship that has sunk without fault of the owner or his agents imposed no liability on the owner before the passing of the Navigable Waters Protection Act.⁷⁶

There is some authority, too, that the public right of navigation being paramount, countervailing public benefit from the obstruction should be ignored.⁷⁷ However, here too the law is in a state of flux, and the public benefit is considered under certain circumstances; it is clear, however, that the public to be considered, in assessing whether an obstruction constitutes a public nuisance or not, is not the

70. (1907), 7 W.L.R. 22.

71. *Reg. v. Lord* (1864), 1 P.E.I. 245; *McInsley v. Gilley* (1907), 7 W.L.R. 22; *City of New Westminster v. S.S. Maagen* (1913), 14 Ex. C.R. 323.

72. *Reg. v. Moss* (1896), 26 S.C.R. 322; see also *Stephens and Mathias v. MacMillan*, [1954] 2 D.L.R. 135.

73. See *Reg. v. The Port Perry and Port Whitby Ry.* (1876), 38 U.C.Q.B. 431; *McNeil v. Jones* (1894), 26 N.S.R. 299; *Huntley v. Jeffers* (1906), 1 E.L.R. 385; *Cunard v. R.* (1910), 43 S.C.R. 88, *per Duff J.* (diss.), citing *Attorney-General v. Terry* (1874), 9 Ch. App. 423; *Woods v. Opsal*, [1918] 1 W.W.R. 985.

74. *Hall v. Ewart* (1873), 33 U.C.Q.B. 491; *Reg. v. The Port Perry and Port Whitby Ry.* (1876), 38 U.C.Q.B. 431; *McNeil v. Jones* (1894), 26 N.S.R. 299.

75. *Reg. v. The Port Perry and Port Whitby Ry.* (1876), 38 U.C.Q.B. 431; *McNeil v. Jones* (1894), 26 N.S.R. 299; *Quiddy River Boom Co. v. Davidson* (1886), 25 N.B.R. 580; *Huntley v. Jeffers* (1906), 1 E.L.R. 385; *Stephens and Mathias v. MacMillan*, [1954] 2 D.L.R. 135.

76. *North West Navigation Co. v. Walker* (1884), 3 Man. R. 25; *Reg. v. Mississippi and Dominion Steamship Co.* (1894), 4 Ex. C.R. 298; *Anderson v. R.* (1919), 59 S.C.R. 379; *Attorney-General of Canada v. Brister*, [1943] 3 D.L.R. 50; *Sauvageau v. R.*, [1950] S.C.R. 664.

77. *Reg. v. Moss* (1896), 26 S.C.R. 322; *Stephens and Mathias v. MacMillan*, [1954] S.C.R. 322.

public at large, but those frequenting the port.⁷⁸ Thus a work that slightly obstructs navigation, for example a wharf which on balance improves navigation at a port, would not be a public nuisance.⁷⁹ The same may possibly be true of a bridge over navigable waters where a pier slightly interferes with navigation,⁸⁰ but this is by no means certain.⁸¹ In the cases where the public benefit was considered as a factor in determining that an obstruction was not a public nuisance, the obstruction was minor and the benefit to the public quite obvious.

Remedies

The usual remedy against a public nuisance is not by action but by indictment,⁸² which requires the intervention of the Attorney-General.⁸³ The Attorney-General may also bring an action against a person who maintains a nuisance.⁸⁴ Some cases hold that the provincial Attorney-General has jurisdiction in these matters;⁸⁵ others, that the Attorney-General of Canada has.⁸⁶ The probability is that either may act;⁸⁷ the administration of justice is vested in the province, but the federal Parliament has jurisdiction over navigation and shipping.

Where a party has suffered special damage, it is not necessary that an indictment be brought or that the party seek the intervention of the Attorney-General in an action; he may himself bring an action.⁸⁸ Special damages means damages in addition to that suffered by the public at large.⁸⁹ Such damages arise, for example, where a person's ship is prevented from continuing its journey because of an obstruction in navigable waters, as occurred in *Crandell v. Mooney*⁹⁰ where the obstruction consisted of logs which had been collected by means of a boom placed in a river by the defendants. Again in *Watson v. Toronto Gas-light and Water Co.*,⁹¹ the defendant was held to have been specially damnified when he had to

78. *Reg. v. Lord* (1864), 1 P.E.I. 245; *Mahon v. McCully* (1868), 7 N.S.R. 323; *Attorney-General v. Terry* (1874), 9 Ch. App. 423; *Carvell v. City of Charlottetown* (1876), 2 P.E.I. 115;
79. *Myrer v. Clish* (1884), 40 N.S.R. 1; *Cunard v. R.* (1910), 43 S.C.R. 88, per Duff J. (diss.), at p. 100; *Woods v. Opsal*, [1918] 1 W.W.R. 985.
80. *Reg. v. Lord* (1864), 1 P.E.I. 245; *O'Dwyer v. Tessier* (1859), 4 Nfld. L.R. 278; *Tessier v. O'Dwyer* (1859), 4 Nfld. L.R. 284.
81. *Attorney-General v. Terry* (1874), 9 Ch. App. 423.
82. *Myrer v. Clish* (1884), 40 N.S.R. 1.
83. *Watson v. Toronto Gas-light and Water Co.* (1847), 4 U.C.Q.B. 158; *Reg. v. Meyers* (1853), 3 U.C.C.P. 305; *Small v. Grand Trunk Ry.* (1857), 15 U.C.Q.B. 283; *Crandell v. Mooney* (1873), 23 U.C.C.P. 212.
84. *Attorney General of Canada v. Brister*, [1943] 3 D.L.R. 50; see also *Nicholson v. Moran*, [1949] 4 D.L.R. 571.
85. *Attorney-General of Canada v. Brister*, [1943] 3 D.L.R. 50.
86. *Attorney-General v. Niagara International Bridge Co.* (1873), 20 Gr. 34; *Attorney-General of Canada v. Brister*, [1943] 3 D.L.R. 50.
87. *Attorney-General of Canada v. Ewen* (1895), 3 B.C.R. 468; *Attorney-General of Canada v. Brister*, [1943] 3 D.L.R. 50.
88. *Watson v. Toronto Gas-light and Water Co.* (1847), 4 U.C.Q.B. 158; *Small v. Grand Trunk Ry.* (1857), 15 U.C.Q.B. 283; *Crandell v. Mooney* (1873), 23 U.C.C.P. 212; *Snure v. Great Western Ry.* (1884), 13 U.C.Q.B. 376; *Myrer v. Clish* (1884), 40 N.S.R. 1; *North West Navigation Co. v. Walker* (1885), 3 Man. R. 25; *Baldwin v. Chaplin* (1915), 21 D.L.R. 846; *Grand Trunk Pacific Ry. v. British Columbia Express Co.* (1916), 55 S.C.R. 328; *S. S. "Eurena" v. Burrard Inlet Tunnel and Bridge Co.*, [1931] A.C. 300; *Nicholson v. Moran* [1949] 4 D.L.R. 571.
89. *Small v. Grand Trunk Ry.* (1857), 15 U.C.Q.B. 158; *Bell v. Corporation of Quebec* (1879), 5 A.C. 84; *Rainy River Navigation Co. v. Ontario and Minnesota Power* (1914), 17 D.L.R. 850; *Baldwin v. Chaplin* (1915), 21 D.L.R. 846.
90. (1873), 23 U.C.C.P. 212.
91. (1847), 4 U.C.Q.B. 158.

destroy whiskey because he had used water polluted by the defendants. These cases should be contrasted with cases like *Baldwin v. Chaplin*⁹² where piers had been erected in navigable waters, which caused inconvenience to the plaintiff but which was no different from that suffered by the public generally; in such cases proceedings should be by way of indictment.

Some of the more difficult cases arise where riparian owners bring action in respect of an obstruction to navigation affecting the enjoyment of their land. At one extreme, a riparian owner may bring an action for any interference to his access to his land, and this he may do without proof of damage.⁹³ Such an action is not based on an interference with the public right of navigation, but on a land-owner's right of access to his land, a property right. This right, and its relation to the public right of navigation, will be examined later.⁹⁴ At the opposite extreme, it is not enough to ground an action for interference with navigation that the plaintiff's land in common with that of others along a river is rendered less valuable because of the obstruction.⁹⁵

The difficulties lie between these two extremes, and perhaps the best approach is to give some examples of cases where the courts have held there was special damage. Thus where a person can show that a particular trade has suffered from the existence of an obstruction he may bring an action without the intervention of the Attorney-General. For example, in *Rainy River Navigation Co. v. Ontario and Minnesota Power*,⁹⁶ the defendant penned back water on Rainy River to such an extent that the plaintiffs' steamboats on the other side were delayed, its schedules were interrupted and its earnings decreased. The plaintiffs were engaged as carriers and owned wharves and properties along the river used in prosecuting its business. They were permitted to bring action.

The fact that a person owns riparian land is in any event an important element in determining whether he has sustained special damages from the existence of an obstruction to navigation. This can be seen from *Drake v. Sault St. Marie Pulp and Paper Co.*⁹⁷ The plaintiff, a fisherman, lived on a small farm fronting on, and about three miles from the mouth of, the Goulais River, a navigable stream flowing into Lake Superior. In addition to fishing, he was in the habit of navigating by sail boat from his house to the lake and thence to Sault St. Marie and other points, and he was sometimes employed by neighbours to bring provisions and supplies. The defendant boomed large quantities of logs at the mouth of the river, so that access to the lake was blocked for the whole summer. While the plaintiff's access to his land was not prevented, the obstruction was sufficient to interrupt his access to the more extensive highway to which the river leads.

The plaintiff must, therefore, show that he has suffered damages, and these damages must result from the obstruction. Thus in *Grand Trunk Pacific Ry v.*

92. (1915), 21 D.L.R. 846.

93. See, *inter alia*, *Bell v. Corporation of Quebec* (1879), 5 A.C. 84; *Nicholson v. Moran*, [1949] 4 D.L.R. 571.

94. See pp. 201-4.

95. *Small v. Grand Trunk Ry.* (1857), 15 U.C.Q.B. 283; *Baldwin v. Chaplin* (1915), 21 D.L.R. 846; *Nicholson v. Moran*, [1949] 4 D.L.R. 571.

96. (1914), 17 D.L.R. 850; see also *Small v. Grand Trunk Ry.* (1857), 15 U.C.Q.B. 283.

97. (1898), 25 O.A.R. 251; following *Bell v. Corporation of Quebec* (1879), 5 A.C. 84; see also *Myrer v. Clish* (1884), 40 N.S.R. 1.

British Columbia Express Co.,⁹⁸ the plaintiff failed in his action, though he had shown that he had not used a river since a bridge that interfered with navigation had been built there, because the evidence established that the bridge was not the cause of the non-user. There are cases, however, where damages from the obstruction having been shown to exist, the plaintiff is not required to establish them with precision.⁹⁹

It would also appear that a plaintiff may sue in respect of damage suffered by him from an interference with navigation even though the damage does not result from interference with his navigation. In *Stephens and Mathias v. MacMillan*,¹⁰⁰ the plaintiff's airplane while landing struck a wire erected by the defendant over navigable waters from an island to the mainland. McLennan J. of the Ontario High Court found as a fact that the wire could interfere with navigation as it was capable of being exercised (though it was not, in fact, so exercised), and he held the defendant liable for the damages suffered by the plaintiff, even though the latter was not navigating the river, on the ground that where damages result from an illegal act, the person causing the illegal act is liable notwithstanding that there is no causal connection between the damages suffered and the circumstances giving the act its illegal character. However, the damages must be proximately connected with the obstruction. In *Gagné v. Rainy River Lumber Co.*¹⁰¹ the plaintiff, a ferryman, brought action against the defendant who claimed relief over against a power company because the sluiceways in their dam were not sufficient to accommodate his logs. Teetzel J. of the Ontario High Court held, *inter alia*, that the damages suffered by the defendant through the plaintiff's action were too remote and he could not recover these from the power company.

A person affected by an interference to navigation constituting a public nuisance is not limited to proceedings by way of indictment or to the recovery of damages by action. A court may also order the abatement of the nuisance.¹⁰² Moreover, under the Navigable Waters Protection Act power is given to the Minister of Transport to abate the nuisance pursuant to the procedure spelled out in that Act.¹⁰³ In addition anyone whose way is impeded by an obstruction to the public right of navigation may remove it, provided he causes no unnecessary damage,¹⁰⁴ but members of the public generally have no such right. It may be noted that silt, even where naturally deposited, may constitute an interference with navigation, and accordingly a person may dredge the bed of navigable waters to remove it.¹⁰⁵ A person whose right of navigation is obstructed may also use the obstruction as a means of making the highway available, provided no unnecessary damage is caused. Thus in *Clendinning v. Turner*¹⁰⁶ a person who had been authorized by the owner of riparian land to run his vessels to the land was held entitled to use a wharf adjoining such land built by a third person with the permis-

98. (1916), 55 S.C.R. 328; see also *Langstaff v. McRae* (1893), 22 O.R. 78.

99. *Rainy River Navigation Co. v. Watrous Island Boom Co.* (1914), 6 O.W.N. 537.

100. [1954] 2 D.L.R. 135.

101. (1910), 20 O.L.R. 433.

102. *Champion and White v. City of Vancouver*, [1918] 1 W.W.R. 216.

103. See the discussion of this Act at pp. 248-61.

104. *Bruce v. Union Forwarding Co.* (1871), 32 U.C.Q.B. 43; *Wood v. Esson* (1883), 9 S.C.R. 239;

Clendinning v. Turner (1885), 9 O.R. 34; *Kennedy v. The Surrey* (1905), 10 Ex. C.R. 29.

105. *International Fertilizers Ltd. v. Harbour Development Ltd.* (1968), 67 D.L.R. (2d) 688.

106. (1885), 9 O. R. 34.

sion of the Commissioner of Crown Lands. The Court of Common Pleas of Ontario held that the public had a right to reach the shore over navigable waters, and having been invited by the riparian owner to go on the land he could use the wharf which prevented him from reaching the land.

Modification of Right by Statute

Nothing short of legislation can take away the public right of navigation.¹⁰⁷ The Crown in right of the Dominion or of a province cannot abolish the right in the absence of an authorizing statute. Accordingly a Crown grant of land does not and cannot give a right to interfere with navigation.¹⁰⁸ If the waters are navigable the public right of navigation exists no matter who owns the bed.¹⁰⁹

The only legislature competent to authorize interferences with navigation is the federal Parliament.¹¹⁰ However, statutes controlling or giving rights to interfere with navigation enacted by a provincial legislature before Confederation continue to be valid unless repealed by that legislature before Confederation or by the federal Parliament since that time.¹¹¹ With the federal legislative power over navigation and shipping goes any executive or administrative power relating thereto.¹¹² Accordingly, a power given to a Lieutenant-Governor in Council before Confederation to authorize interferences with navigation has since Union been vested in the Governor-General in Council.¹¹³

Though the federal Parliament has power to legislate respecting navigation and to control works in navigable waters,¹¹⁴ there are numerous occasions when both federal and provincial powers must be used to authorize interferences with navigation. For the federal Parliament is limited to that and other heads of power; it cannot invade the provincial sphere. Thus federal statutory permission to build a dam in navigable water is necessary, but such permission cannot interfere with the rights to the bed,¹¹⁵ which will usually be in the province¹¹⁶ or a private owner. Conversely, while a province may incorporate log boom companies,¹¹⁷ such companies are not thereby authorized to unreasonably interfere with the right of others to navigate a river.¹¹⁸

Finally, where a statute authorizes interferences with navigation, the right must be exercised in strict compliance with the statute.¹¹⁹ Moreover, it will not lightly

107. *Kennedy v. The Surrey* (1905), 10 Ex. C.R. 29.

108. *Wood v. Esson* (1883), 9 S.C.R. 239; *Reg. v. Fisher* (1891), 2 Ex. C.R. 365; *Saint John Harbour Commissioners v. Eastern Coal Docks Ltd.* (1935), 8 M.P.R. 499.

109. See, *inter alia*, *Stephens and Mathias v. MacMillan*, [1954] 2 D.L.R. 135; *Simpson Sand Co. Ltd. v. Black Douglas Contractors Ltd.*, [1964] S.C.R. 333.

110. See pp. 28-38.

111. *Caldwell v. McLaren* (1884), 9 A.C. 392; *Booth v. Lowery* (1917), 54 S.C.R. 421; *Saint John Harbour Commissioners v. Eastern Coal Docks Ltd.* (1935), 8 M.P.R. 499.

112. See *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437.

113. *Reg. v. Fisher* (1891), 2 Ex. C.R. 365.

114. *Re Provincial Fisheries* (1896), 26 S.C.R. 444, at p. 538.

115. *Clipsham v. Orillia* (1905), 5 O.W.R. 298 (leave to appeal refused: (1905), 9 O.L.R. 713); *Isherwood v. Ontario and Minnesota Power Co.* (1911), 18 O.W.R. 459.

116. *Reg. v. Moss* (1896), 26 S.C.R. 322; *Capital Canning Co. v. Anglo-British Columbia Packing Co.* (1905), 11 B.C.R. 333.

117. *Queddy River Driving Boom Co. Ltd. v. Davidson* (1883), 10 S.C.R. 222.

118. *Ireson v. Holt Lumber Co.* (1913), 18 D.L.R. 604.

119. *S. S. "Eurenda" v. Burrard Inlet Tunnel and Bridge Co.*, [1931] A.C. 300.

be assumed that a statute was intended to interfere with navigation.¹²⁰ When, however, Parliament does authorize the creation of an obstruction to navigation, the person so authorized and the person navigating have equal rights and each must exercise his right reasonably so as not to interfere unreasonably with the right of the other. This was held to be the situation in *Rolston v. Red River Bridge Co.*¹²¹ There the defendant had been authorized by statute to build a bridge and the mere fact that the plaintiff's raft was sunk by striking the piers did not give him a right of action in the absence of any fault on the part of the defendant.

THE PUBLIC RIGHT OF FLOATING

Somewhat similar to the right of navigation is the public right to float logs and other property on navigable and floatable streams. There is no general right of floating in England, but such a right was sometimes recognized as a custom (i.e. a local variation of the common law) or by a holding that the owner of the bed had dedicated a highway or right of passage to the public for the purpose.¹²² But since a custom will not be recognized in Canada¹²³ this device was not appropriate here. And dedication was often inapplicable because many of our rivers were used to transport property long before there were owners to dedicate them. Yet in a young country like Canada, the right to float logs and timber was an economic necessity in many areas and some device had to be found to make the activity legal.

In New Brunswick a local adaptation of the common law was made recognizing the right to float logs and timber on streams and lakes suitable for the purpose. The right seems to have been originally looked upon as part of the public right of navigation,¹²⁴ but it later developed as a separate right and there are important differences between the two rights that warrant separate treatment. The courts¹²⁵ and the Newfoundland legislature¹²⁶ also recognized the existence of such a right in that province, though there is a statute governing the right¹²⁷ and the common law on the subject was not developed there. It is probable that the courts would have worked out a means of protecting this activity in Nova Scotia as well,¹²⁸ but there the law on the floating of logs is entirely governed by statute.¹²⁹ There is no statute on the subject in Prince Edward Island, and the floating of logs not being

120. See *Nardini v. Reid* (1898), 8 Nfld. L.R. 134; *Champion and White v. City of Vancouver*, [1918] 1 W.W.R. 216.

121. (1884), 1 Man. R. 235.

122. *Caldwell v. McLaren* (1884), 9 A.C. 392.

123. *Donnelly v. Vroom* (1907), 40 N.S.R. 585; affirmed: (1909), 42 N.S.R. 327 where Townshend J. agreed with the judge below, but Russell J. refused to pass on the point.

124. *Esson v. McMaster* (1842), 3 N.B.R. 501; *Rowe v. Titus* (1849), 6 N.B.R. 326; three judges, Cartwright, Martland and Ritchie JJ. thought this the case of the Ontario right in *Upper Ottawa Improvement Co. v. Hydro-Electric Power Commission of Ontario*, [1961] S.C.R. 486 but the remaining six judges thought the right in that province wholly dependent on statute.

125. *Robinson v. Murray* (1851), 3 Nfld. L.R. 184; *Hugh W. Simmons Ltd. v. Foster*, [1955] S.C.R. 324, per Rand J. In *Nardini v. Reid* (1898), 8 Nfld. L.R. 134, however, the opposite view was taken.

126. See Crown Lands Act, R.S.N., 1884, c. 2, ss. 57, 58; re-enacted: R.S.N. 1952, c. 174, ss. 82, 83.

127. Transportation of Timber Act, 1904, c. 13 (Nfld.); see also *ibid.*

128. See *Caldwell v. McLaren* (1881), 6 O.A.R. 456, per Burton J. and in the Privy Council (1884), 9 A.C. 392; *Roy v. Fraser* (1903), 36 N.B.R. 113.

129. See the Nova Scotia statutes on floating discussed at pp. 296-7.

required for the economy of the province, it is doubtful if the right would exist there. The following discussion of the common law is, therefore, in strictness applicable to New Brunswick only, but the development of the statutory powers in other provinces and the common law in New Brunswick have been so similar, that the following discussion is relevant to an understanding of the law in the other provinces.

A floatable stream is one that is not navigable in the strict sense but is navigable by canoes and other small craft and is capable of floating logs and other property.¹³⁰ The courts often classify rivers as public rivers (i.e. tidal navigable rivers) and private rivers (i.e. non-navigable rivers). The latter if capable of being floated are subject to the public right of floating.¹³¹ Whether they are or not is a question of fact.¹³² Among the New Brunswick rivers held to be floatable, though non-navigable, are the Hammond River,¹³³ the Salmon River below Grand Falls,¹³⁴ the Tetagouche,¹³⁵ the North-West Miramichi above Price's Bend,¹³⁶ the Nashwaak,¹³⁷ Green River,¹³⁸ and the Barnaby.¹³⁹ There are, of course, many others, notably the Saint John.

It is not necessary to give the public the right to float that a stream be floatable at all times; the right may exist even if it only has the capacity to float at freshet times.¹⁴⁰ As in the case of the statutory rights in other provinces,¹⁴¹ the New Brunswick courts hold that the public right exists when a stream is made floatable by penning water back for a time by means of a dam, at least, where the stream is floatable at certain times.¹⁴² In any event it is clear that in exercising the right to float, a person may go on riparian land when necessary to remove logs that have been cast on the shore.¹⁴³

As in the case of navigation, all have equal rights to passage for their logs and other property, and so each person exercising the right must act with due regard for the similar rights of others.¹⁴⁴ Unlike the right of navigation, however, the right to float is not paramount; it does not prevail over the rights of the owners of the bed and bank but is concurrent with them.¹⁴⁵ One who floats logs or other

130. *Reg. v. Robertson* (1882), 6 S.C.R. 52; *Roy v. Fraser* (1903), 36 N.B.R. 113; *Watson v. Patterson* (1903), 2 N.B. Eq. 488; *Bathurst Lumber Co. v. Harris* (1919), 46 N.B.R. 411.

131. *Esson v. McMaster* (1842), 3 N.B.R. 501; *Rowe v. Titus* (1849), 6 N.B.R. 326; *Roy v. Fraser* (1903), 36 N.B.R. 113; *Watson v. Patterson* (1903), 2 N.B. Eq. 488; *Wade v. Nashwaak Pulp and Paper Co.* (1918), 46 N.B.R. 11.

132. *Richard v. Morris*, [1956] Que. S.C. 314.

133. *Rowe v. Titus* (1849), 6 N.B.R. 326.

134. *Watson v. Patterson* (1903), 2 N.B. Eq. 488.

135. *Bathurst Lumber Co. v. Harris* (1919), 46 N.B.R. 411.

136. *Reg. v. Robertson* (1882), 6 S.C.R. 52.

137. *Wade v. Nashwaak Pulp and Paper Co.* (1918), 46 N.B.R. 11.

138. *Roy v. Fraser* (1903), 36 N.B.R. 113.

139. *Esson v. McMaster* (1842), 3 N.B.R. 501.

140. *Ibid.*; see also *Hugh W. Simmons Ltd. v. Foster*, [1955] S.C.R. 324.

141. See, for example, the Newfoundland statutes discussed at pp. 310-2.

142. See *Mitten v. Wright* (1895), 1 N.B. Eq. 171; *Bathurst Lumber Co. v. Harris* (1919), 46 N.B.R. 411.

143. *Quiddy River Boom Co. v. Davidson* (1886), 25 N.B.R. 580.

144. See *Hugh W. Simmons Ltd. v. Foster*, [1955] S.C.R. 324.

145. *Ward v. Grenville* (1902), 32 S.C.R. 510; *Roy v. Fraser* (1903), 36 N.B.R. 113; *Watson v. Patterson* (1903), 2 N.B. Eq. 488; *Booth v. Lowery* (1917), 54 S.C.R. 421; *Wade v. Nashwaak Pulp Co.* (1918), 46 N.B.R. 11; *Bathurst Lumber Co. v. Harris* (1919), 46 N.B.R. 411; *Upper Ottawa Improvement Co. v. Hydro-Electric Power Commission of Ontario*, [1961] S.C.R. 486.

property down a stream must do so in a reasonable manner, interfering as little as possible with the rights of landowners along the stream, and if he injures the property of a landowner the onus is on him to show that his conduct was reasonable. The onus is a heavy one; he must show that in driving his logs he has adopted all reasonable means to avoid the injury.¹⁴⁶ What is reasonable in a particular case cannot be determined *a priori*. The approach to be taken to the question has thus been put:

The degree of care, skill and diligence required of the log owners depends largely on the circumstances surrounding each case, and the rule applicable to cases of riparian proprietary interests and log owners is equally applicable to cases of owners of legally constructed bridges crossing the river for public or private use or convenience. What might reasonably constitute reasonable and proper skill and diligence in one case might quite easily assume and become negligence in another.¹⁴⁷

A greater degree of care will, for example, be required when a river runs through narrow gorges where jams may easily form,¹⁴⁸ or again where there are bridges or dams that could be injured.¹⁴⁹ It is not sufficient that all care and skill are exercised in driving the logs in a particular way; reasonableness may require alternative methods. Thus in *Ward v. Grenville*,¹⁵⁰ where the plaintiff's bridge was carried away following the backing up of water penned back by a jam of logs belonging to the defendant, the stationing of a force of men to protect the bridge was held not to be sufficient to absolve the defendant of liability. Other reasonable steps should have been taken to prevent the creation of a dangerous jam, such as, for example, placing a safety boom above the bridge.

Riparian owners must on their part exercise their rights so as to hinder as little as possible persons floating logs on the stream. For example, a person who owns the bed of a stream has a right to dam the stream, but if it is floatable he is under an obligation at common law to provide sluiceways or other reasonable means to allow logs and timber to pass.¹⁵¹ Obviously, however, the exercise by a landowner of his right to build a dam will affect the flow of the water and consequently log driving operations. It follows from the fact that the rights to build a dam and to float are concurrent that a person driving logs must submit to a reasonable measure of inconvenience and expense resulting from the altered flow of the river resulting from the erection of the dam. This is the attitude taken by the Supreme Court of Canada in relation to statutory rights to float in other provinces. In *Upper Ottawa Improvement Co. v. Hydro-Electric Power Commission of Ontario*,¹⁵² the plaintiff company which was engaged in driving logs on the Ottawa River where it forms the interprovincial boundary between Ontario and Quebec

146. See especially *Ward v. Grenville* (1902), 32 S.C.R. 510; *Roy v. Fraser* (1903), 36 N.B.R. 113; *Wade v. Nashwaak Pulp Co.* (1918), 46 B.B.R. 11; *Bathurst Lumber Co. v. Harris* (1919), 46 N.B.R. 411.

147. *Ward v. Grenville* (1902), 32 S.C.R. 510, at pp. 528-9; *Bathurst Lumber Co. v. Harris* (1919), 46 N.B.R. 411, at pp. 442-3; see also *Watson v. Patterson* (1903), 2 N.B. Eq. 488, at pp. 491-2 citing from *Davis v. Winslow* (1861), 51 Me. 264, at p. 291.

148. *Bathurst Lumber Co. v. Harris* (1919), 46 N.B.R. 411.

149. *Ward v. Grenville* (1902), 32 S.C.R. 510.

150. *Ibid.*

151. *Roy v. Fraser* (1903), 36 N.B.R. 113.

152. [1961] S.C.R. 486; see also *Hugh W. Simmons Ltd. v. Foster*, [1955] S.C.R. 324 discussed at p. 312.

brought action against the Commission which had built several dams in the river under an interprovincial arrangement. There were provisions both in statutes and in the agreement reserving the lawful rights of timber owners and others to drive their logs down the river. The plaintiff's complaint was that the dams had so altered the flow of water that it was obliged to tow the logs which formerly had floated freely in the current, thus increasing the plaintiff's costs of driving. But the court held that the rights to float and to build a dam were concurrent rights. The plaintiff could not be deprived of its right of passage, but it did not own the water, and must put up with the change in flow resulting from the Commission's lawful exercise of its rights.

In the foregoing case, the authorization to build the dam expressly preserved the right to float. A statute could, of course, provide that a dam be built and abolish the right to float. Whether this would require provincial or federal authorization is, however, an open question and has been discussed elsewhere.¹⁵³ But in any event, it is highly unlikely that a statute would be so interpreted in the absence of clear words unless the authorized work could not be constructed without putting an end to the right. This is supported by *Thompson v. Halifax Power Co.*¹⁵⁴ There an Act authorized the forcible acquisition of lands and lakes and streams for the purpose of developing electric power plants. The Act was construed as not applying to floatable rivers since this would, *inter alia*, interfere with the public right of floating, there given by statute.

If the right of passage on a river is blocked, a person driving logs may remove the obstruction as in the case of any other public nuisance if he suffers thereby. Thus in *Hugh W. Simmons Ltd. v. Foster*,¹⁵⁵ the respondent was held justified in moving a boom placed by the appellant above his mill to permit the respondent's logs to be floated down the river. But he would not have been justified in removing the obstruction unless it obstructed him. Thus in *Davis v. Hayden*¹⁵⁶ the plaintiff had erected a dam across a stream for the purposes of his mill, and while the court thought this might constitute a nuisance to the public, the defendant, who had not been obstructed thereby in the exercise of his public right to use the stream, was held not to be justified in destroying the dam. Of course, as in the case of other public nuisances, an indictment may be brought against a person blocking a floatable stream, and if a person suffers special damage from the obstruction he may bring an action.¹⁵⁷

The extent to which a person may increase the floatability of a stream to the damage of a riparian owner's land has been discussed in the case of *Mitten v. Wright*.¹⁵⁸ There the plaintiff purchased land in 1871 through which Prosser Brook flowed. The brook was then from six to eight feet in width, but it was widened by a dam built by the defendant in 1883 on the lot above and by inroads to the banks

153. See pp. 30-2.

154. (1914), 47 N.S.R. 536; see also *Miller and Thompson v. Halifax Power Co.* (1913), 47 N.S.R. 334.

155. [1955] S.C.R. 324.

156. (1864), *Steven's Dig.* 786; *Can. Abridg.*, vol. 35, col. 538.

157. See *Crandell v. Mooney* (1873), 23 U.C.C.P. 212; *North West Navigation Co. v. Walker* (1895), 3 Man. R. 25; *Ireson v. Holt Lumber Co.* (1913), 18 D.L.R. 604; *Hugh W. Simmons v. Foster*, [1955] S.C.R. 324.

158. (1895), 1 N.B. Eq. 171.

caused by the defendant's lumber operations. The plaintiff had helped to construct an earlier dam in 1876 (which was replaced by that of 1883) and in some years had assisted in the driving operations. The plaintiff, however, brought action in 1895 to prevent the defendant from carrying on the driving operations in such a way as to injure the plaintiff's land. The court held that gradual and increasing damage to the land of a riparian owner from log driving operations and from the overflow of water caused by the defendant's driving dam extending over a number of years would not give a right to do so by prescription. If prescription could give an easement to the same overflow, it did not operate here because it had not gone on for twenty years. The assistance given by the plaintiff in the driving operations did not amount to a licence to continue to do so. Nor did it constitute acquiescence sufficient to preclude the plaintiff from bringing his action; to constitute such acquiescence fraud was necessary.

Additional problems arise where a river is navigable as well as floatable. The rights of navigation and floating appear to be assimilated to some extent. All persons have an equal right to navigate such rivers with logs or boats, which right must not be exercised so as to unreasonably impede or prevent others from exercising the right.¹⁵⁹ The factors examined by the courts in determining what is reasonable have already been examined in connection with the public right of navigation.¹⁶⁰ Though the two rights appear to be equated in the cases,¹⁶¹ it will usually be log driving that interferes with navigation. The courts have on several occasions held that if log booms or jams unreasonably impede navigation this constitutes a public nuisance for which an indictment or an action by the Attorney-General may be brought, and if a person suffers special damage he may bring an action or abate the nuisance by removing it. How long a person would be permitted to obstruct a navigable river is not clear. As in all these cases the question is one of reasonableness in the circumstances. But certainly a navigable river cannot be blocked indefinitely. In *Crandell v. Mooney*,¹⁶² where the plaintiff's steamboat was prevented from continuing its journey because of a log jam, the prevention of navigation for eight days was considered unreasonable notwithstanding that the delay was contributed to by adverse weather.

Similarly a person whose right of access is blocked by logs may bring an action against the owner of the logs.¹⁶³

THE PUBLIC RIGHT OF FISHING

The public has a right to fish in all tidal waters whether in the sea, or arms of the sea, or in estuaries or a tidal river or otherwise, up to the point where the

159. See *Crandell v. Mooney* (1873), 23 U.C.C.P. 212; *North West Navigation Co. v. Walker* (1885), 3 Man. R. 25; *Quiddy River Boom Co. v. Davidson* (1886), 25 N.B.R. 580; *Upper Ottawa Improvement Co. v. Hydro-Electric Power Commission of Ontario*, [1961] S.C.R. 486.

160. See, *inter alia*, *Crandell v. Mooney* (1873), 23 U.C.C.P. 212.

161. See *Crandell v. Mooney* (1873), 23 U.C.C.P. 212; *North West Navigation Co. v. Walker* (1885), 3 Man. R. 25; *Ireson v. Holt Lumber Co.* (1913), 18 D.L.R. 604.

162. (1873), 23 U.C.C.P. 212.

163. *Ireson v. Holt Lumber Co.* (1913), 18 D.L.R. 604.

tide ebbs and flows.¹⁶⁴ Accordingly the grant of land over which tidal water flows does not automatically carry with it the exclusive right to fish in that water as it does in fresh water.¹⁶⁵ In fact, since Magna Charta the Crown has no power apart from statute to grant a several (or exclusive) fishery in tidal waters either to the owner of the land or to anyone else.¹⁶⁶ Since Canada was not settled before then, there cannot be a several fishery in tidal waters in the parts of Canada governed by common law except by statute.

While it is clear in England that the public right of fishing is limited to tidal waters,¹⁶⁷ there is some Canadian authority for the view that the public right of fishing also exists in waters that are navigable though not tidal.¹⁶⁸ If this were so the restriction in Magna Charta against the granting of several fisheries by the Crown would be inapplicable, that restriction being limited to tidal waters.¹⁶⁹ In any event the weight of authority is very clearly against the existence of a general public right of fishing in non-tidal waters.¹⁷⁰ There are some statements, however, that a public right of fishing exists in non-tidal waters where the bed is owned by the Crown,¹⁷¹ but while fishing may be public in the sense that it is provincial property and the province may permit the public to fish there, it is not public in the sense that a general right exists in the public.

The public right of fishing does not extend to fishing by means of kiddles, weirs and other instruments fixed to the soil. Such methods of fishing involve a use of the bed which under English law is vested either in the Crown or a private owner.¹⁷² If the soil is to be used in this manner, the permission of the owner must be obtained.¹⁷³ This can give rise to duplication of administration at the federal

164. *Gage v. Bates* (1858), 7 U.C.C.P. 116; *Reg. v. Lord* (1861), 1 P.E.I. 245; *Rose v. Belyea* (1867), 12 N.B.R. 109; *Steadman v. Robertson* (1879), 18 N.B.R. 580; *Dogerty v. Power* (1881), R.E.D. 419; Can. Abridg., vol. 20, col. 378; *Reg. v. Robertson* (1882), 6 S.C.R. 52; *Nash v. Newton* (1891), 30 N.B.R. 610; *McNeil v. Jones* (1854), 26 N.S.R. 299; *In re Provincial Fisheries* (1895), 26 S.C.R. 444; *Donnelly v. Vroom* (1907), 40 N.S.R. 585; affirmed: (1909) 42 N.S.R. 327; *City of St. John v. Belyea* (1919), 47 N.B.R. 155; *Attorney-General of British Columbia v. Attorney-General of Canada*, [1914] A.C. 153; *Attorney-General of Canada v. Attorney-General of Quebec*, [1921] 1 A.C. 413.

165. *Ibid.*

166. *Meisner v. Fanning* (1842), 3 N.S.R. 97; *Rose v. Belyea* (1867), 12 N.B.R. 109; *Donnelly v. Vroom* (1907), 40 N.S.R. 585; affirmed: (1909), 42 N.S.R. 327, *Attorney-General of British Columbia v. Attorney-General of Canada*, [1914] A.C. 153; *Attorney-General of Canada v. Attorney-General of Quebec*, [1921] 1 A.C. 413. *In Re Provincial Fisheries* (1895), 26 S.C.R. 444, Girouard J. seemed to doubt the application of Magna Charta outside England, but Strong C.J. and Gwynne J. thought it applied.

167. See *Attorney-General of British Columbia v. Attorney-General of Canada*, [1914] A.C. 153; *Attorney-General of Canada v. Attorney-General of Quebec*, [1921] 1 A.C. 413.

168. *Gage v. Bates* (1858), 7 U.C.C.P. 116; *Reg. v. Robertson* (1882), 6 S.C.R. 52, per Strong J.; *Moffatt v. Roddy* (1889), 4 Ont. Cas. Law Dig. 7323; *Re Provincial Fisheries* (1895), 26 S.C.R. 444, per Strong C.J. and Girouard J.

169. *Re Provincial Fisheries* (1895), 26 S.C.R. 444, per Strong J.; cf., *Moffatt v. Roddy* (1889), 4 Ont. Cas. Law Dig. 7323.

170. *Steadman v. Robertson* (1879), 18 N.B.R. 580; *Reg. v. Robertson* (1882), 6 S.C.R. 52, per Ritchie C.J.; *Re Provincial Fisheries* (1895), 26 S.C.R. 444; *Keewatin Power Co. v. Town of Kenora* (1908), 16 O.L.R. 184; *R. v. Harron* (1912), 21 O.W.R. 951; *Attorney-General of British Columbia v. Attorney-General of Canada* [1914] A.C. 153; *Barber v. Andrews* (1921), 20 O.W.N. 239; *Rice Lake Fur Co. v. McAllister*, [1925] 2 D.L.R. 506.

171. See *Robertson v. Steadman* (1876), 16 N.B.R. 621 (the court, however, reversed this view in the later case of *Steadman v. Robertson*, (1879), 18 N.B.R. 580); *Re Iverson and Greater Winnipeg Water District* (1921), 57 D.L.R. 184, per Dennistoun J.; *McDonald v. Linton* (1926), 53 N.B.R. 107, per Barry C.J.

172. *Attorney-General of British Columbia v. Attorney-General of Canada*, [1914] A.C. 153; *Attorney-General of Canada v. Attorney-General of Quebec*, [1921] 1 A.C. 413.

173. *Attorney-General of Canada v. Attorney-General of Quebec* [1921] 1 A.C. 413.

and provincial levels. For example, when lobster fishing is conducted by the use of beds belonging to a province, the person conducting such fisheries must comply with federal licensing and regulatory laws, and he may also be required to obtain a lease or licence from the province to use the soil, which may attach conditions to its use by the terms of the instrument or by legislation.

But the incidental use of private or Crown owned foreshore or seabed in the exercise of the public right of fishing that does not amount to an appropriation of the property is permissible. The public right here prevails over the private.¹⁷⁴ It may be, for example, that a person may have a right of way over the foreshore, or may land his fish, or draw his boat there in the incidental exercise of his right of fishing,¹⁷⁵ though he must do so with due regard for the rights of others, including the landowner.¹⁷⁶

The incidental use of the soil is also permitted in fishing for shell fish such as clams and oysters. Thus in *Donnelly v. Vroom*,¹⁷⁷ the defendant had been granted lands extending down to low water and the grant purported to include the right of fishing, but the plaintiff had nonetheless dug for clams on the flats between high and low water marks. The court held that the plaintiff was entitled to do so. The public right of fishing was not limited to swimming fish, but extended to shell fish covered by the soil as well. Accordingly the plaintiff could dig up the soil for clams, the public right of fishing taking priority over the private right of the defendant. Any additional use of the land not incidental to fishing, for example for storing the fish, would not come within the public right.¹⁷⁸ It is doubtful, too, that there is a right to take shells, as opposed to shell fish on another person's land.¹⁷⁹

The public right of fishing must, as already mentioned, be exercised reasonably having regard to the same rights of other people and to the public right of navigation and private rights.¹⁸⁰ But it is not unreasonable for a person to erect weirs in such a position as to prevent another from securing as many fish as he might otherwise have done.¹⁸¹ Ordinarily, the reasonable exercise of the public rights of navigation and of fishing can be exercised concurrently. Thus a person navigating water would ordinarily be expected to use reasonable care to avoid injuring the nets of fishermen, but where it becomes impossible to exercise both rights concurrently, the public right of navigation is paramount and will prevail.¹⁸²

The Crown as *parens patriae* is a trustee for the public of the public right of fishing.¹⁸³ Accordingly where a person so interferes with the public right of fishing as to constitute a nuisance, an indictment or an action may be brought against him

174. See *Reg. v. Lord* (1964), 1 P.E.I. 245; *Donnelly v. Vroom* (1907), 40 N.S.R. 585; affirmed: (1909), 42 N.S.R. 327.

175. See *Reg. v. Lord* (1864), 1 P.E.I. 245.

176. *Ibid.*; see also *Donnelly v. Vroom* (1907), 40 N.S.R. 585; affirmed: (1909), 42 N.S.R. 327; *City of Saint John v. Belyea* (1919), 47 N.B.R. 155; *Delap v. Hayden* (1924-5), 57 N.S.R. 346.

177. (1907), 40 N.S.R., 585; affirmed: (1909), 42 N.S.R. 327; see also *Delap v. Hayden* (1924-5), 57 N.S.R. 346.

178. See *Coulson & Forbes on Waters and Land Drainage* 6th ed., (London, 1952), at pp. 379 et seq.

179. *Donnelly v. Vroom* (1909), 42 N.S.R. 327.

180. *Reg. v. Lord* (1864), 1 P.E.I. 245; *Donnelly v. Vroom* (1907), 40 N.S.R. 585; affirmed: (1909), 42 N.S.R. 327; *City of St. John v. Belyea* (1919), 47 N.B.R. 155; *Delap v. Hayden* (1924-5), 57 N.S.R. 346.

181. *Cheney v. Guptill* (1871), 13 N.B.R. 378.

182. *McInnsley v. Gilley* (1907), 7 W.L.R. 22.

183. *McNeil v. Jones* (1894), 26 N.S.R. 299.

at the suit of the Attorney-General of Canada¹⁸⁴ and, no doubt, at the suit of the Attorney-General of the province.¹⁸⁵ If a person has suffered a special injury from the nuisance he may bring an action without the intervention of the Attorney-General.¹⁸⁶ *St. John Gas Light Co. v. Reg.*¹⁸⁷ is an instructive case. There the Attorney-General of Canada filed an information in the Exchequer Court of Canada to restrain the defendants from interfering with the public rights of navigation and fishing in the harbour of Saint John. The alleged nuisance was that the defendant discharged tar and other noxious substances, and refuse water at the wrong phase of the tide, to the injury of navigation and the fishery. The court granted the injunction notwithstanding that the harbour was then vested in the city, which was also the conservator of the harbour, and that the inhabitants of the city had the exclusive right to fish therein under the City Charter. In fact, regulation of this fishery was vested in the city by the Charter. The court held that while the city had these powers over the fishery for the benefit of the inhabitants, yet others were interested in the fishery, for many of the fish went up the river to spawn. Another defence offered was that there was a pre-Confederation New Brunswick statute governing the defendants' works that prescribed a penalty for the defendants' acts, and accordingly the common law remedy by indictment could not be pursued. The court, however, held that the common law and statutory remedies were cumulative.

Though the Crown cannot grant an exclusive fishery in tidal waters because of the prohibition in Magna Charta, there is some Canadian authority that a person may acquire a several fishery by prescription.¹⁸⁸ But the better view is that this is impossible in Canada because the theoretical basis for prescription is that a grant was once made. While in England, it is possible to establish that such a grant was made before Magna Charta, this is, of course, impossible in Canada because the country was settled long after that time.¹⁸⁹ In any event, the difficulty of establishing exclusive possession of a fishery would in many cases at least be well-nigh insurmountable.¹⁹⁰

But if a several fishery in tidal waters cannot under Magna Charta be created by Crown grant, and probably not by prescription, it can be created by the appropriate legislature. For example, under the Saint John City Charter, a Royal charter validated and subsequently modified by the New Brunswick legislature, the inhabitants of the east side of the harbour were given the exclusive right of fishing on that side of the harbour subject to regulation by the city, and a similar right was given to the inhabitants of the west side. This right was frequently upheld by the courts,¹⁹¹ though they left no doubt that the federal Parliament could, in exercise

184. *Saint John Gas Light Co. v. Reg.* (1895), 4 Ex. C.R. 326.

185. See the law of nuisance in relation to the public right of navigation discussed at pp. 187-90.

186. *Baldwin v. Chaplin* (1915), 21 D.L.R. 846.

187. (1895), 4 Ex. C.R. 326.

188. *Dogerty v. Power* (1881), R.E.D. 419; Can. Abridg., vol. 20, p. 378; see also *Meisner v. Fanning* (1842), 3 N.S.R. 97.

189. *Donnelly v. Vroom* (1907), 40 N.S.R. 585; affirmed: (1909), 42 N.S.R. 327 where Townshend J. agreed with the judge below, but Russell J. refused to pass on the point.

190. See *Meisner v. Fanning* (1842), 3 N.S.R. 97.

191. *Wilson v. Codyre* (1888), 27 N.B.R. 320; *City of St. John v. Wilson* (1907), 2 N.B.R. Eq. 398; *City of St. John v. Belyea* (1919), 47 N.B.R. 155.

of its jurisdiction over fisheries, regulate this right.¹⁹² In fact the fisheries in the Saint John Harbour are now owned by the federal authorities.¹⁹³

In areas where the subsoil belongs to the province or a private individual, however, it may require action at both the federal and provincial levels to establish an exclusive right of fishery in anyone but the owner of the sub-soil. There is no question that the regulation of the public right of fishery falls exclusively within the federal domain,¹⁹⁴ but it is equally clear that the Dominion cannot take a fishing right incidental to a right of property from the owner of that property and give it to another; this is a matter of property and civil rights falling within provincial jurisdiction.¹⁹⁵ In *Attorney-General of British Columbia v. Attorney-General of Canada*¹⁹⁶ the Privy Council asserted that the private right of fishery incidental to ownership of the soil continued even in tidal waters, though the public right of fishing prevailed. Accordingly it would seem to follow that to establish an exclusive fishery in waters over soil owned by the province or a private individual action would be required by both the federal and provincial legislatures.

192. *Ex Parte Wilson* (1885), 25 N.B.R. 209; *The St. John Gas Light Co. v. Reg.* (1895), 4 Ex. C.R. 326.

193. *See* (1931), 21 Geo. V, c. 68 (N.B.); see also *The Saint John Harbour Commissioners Act* (1927), 17 Geo. V, c. 67 (Can.); *National Harbours Board Act* (1936), 1 Edw. VIII, c. 42, s. 39 (Can.).

194. *Attorney-General of Canada v. Attorney-General of Ontario*, [1898] A.C. 700; *Attorney-General of British Columbia v. Attorney-General of Canada*, [1914] A.C. 153.

195. *Reg. v. Robertson* (1882), 6 S.C.R. 52.

196. [1914] A.C. 153.

CHAPTER NINE

Riparian Rights

By Gerard V. La Forest

INTRODUCTION

The owner of land adjoining a river, stream or lake has certain rights respecting the water therein whether or not he owns the bed.¹ These rights arise from his ownership of the bank, and from the Latin word for bank, *ripa*, they derive their name of riparian rights.² The owner is similarly referred to as a riparian owner.

It is sufficient for the land to be riparian that it comes in contact with a body of water for a substantial part of every day in the ordinary course of nature, but such contact need not continue for the whole of the day. Thus land that comes in contact with the sea or a tidal stream at high tide is riparian land, and its owner is entitled to riparian rights in respect of it.³ There is high authority that the contact may be lateral or vertical;⁴ but this does not apply to shore property covered by water at high tide, for it does not form part of the *ripa*. Thus in *Francis Kerr Co. v. Seeley*,⁵ Seeley was a lessee of a water lot lying in Saint John harbour on the flats between high and low tide. There were other such lots to the south, including that of the defendant company, which proceeded to build a wharf on its lot. This had the effect of blocking access by sea to Seeley's wharf and he brought action. The Supreme Court of Canada held that Seeley was not a riparian owner and did not, therefore, have an action for infringement of access to the sea.

Difficult problems may at times arise as to whether or not land comes in contact with water for the purposes of the rule. Thus in *Merritt v. Toronto*⁶ the plaintiff claimed to be a riparian owner on the shore of Toronto harbour and sought damages and an injunction to prevent the city from interfering with his access to the water when digging a channel on the side of the bay. But the Supreme Court of Canada held on the evidence that between the plaintiff's land and the bay there was marsh land, and not land covered with water. Accordingly the plaintiff was not a riparian owner, even if the marsh consisted of coarse hay growing on a vegetable mass having no contact with the soil.

Since riparian rights depend on the contact of the land with water it follows that changes effected by nature can result in the creation or termination of riparian rights. Thus in *Municipality of Queen's County v. Cooper*,⁷ the respondent's land

1. *Byron v. Stimpson* (1878), 17 N.B.R. 697; *Attrill v. Platt* (1883), 10 S.C.R. 425; *Municipality of Queens County v. Cooper*, [1946] S.C.R. 584.

2. *Byron v. Stimpson* (1878), 17 N.B.R. 697.

3. *Ibid.*; *North Shore Ry. v. Pion* (1889), 14 A.C. 612.

4. *North Shore Ry. v. Pion* (1889), 14 A.C. 612.

5. (1911), 44 S.C.R. 629.

6. (1913), 48 S.C.R. 1; see also *McFeeley v. British Columbia Electric Ry.* (1917), 37 D.L.R. 686.

7. [1946] S.C.R. 584.

when originally granted from the Crown was situate on the Saint John River and was separated from an island thereon by a narrow channel. In the course of time the island became connected with the mainland through a process of accretion, and the alluvium blocked off the respondent's land from the channel. The Supreme Court of Canada held that he had ceased to be a riparian owner.

CLASSIFICATION

The riparian rights may be classified under the following heads:

- (1) the right of access to the water;
- (2) the right of drainage;
- (3) rights relating to the flow of water;
- (4) rights relating to the quality of water (pollution);
- (5) rights relating to the use of water;
and
- (6) the right of accretion.

THE RIGHT OF ACCESS

Protection and Definition of the Right

The most basic of the riparian rights is the right of access to the water; for without it a riparian owner could not enjoy the others. The right of access is a property right, and the owner may, therefore, maintain an action or obtain an injunction against anyone,⁸ even the owner of the bed,⁹ or the Crown,¹⁰ who interferes with the right. These remedies are not restricted to the absolute owners; whoever lawfully occupies riparian land, for example a tenant, may bring an action to enforce it.¹¹ Interference with access, being a property right, is actionable *per se* without proof of damage.¹² While there is early authority for the proposition that an injunction, being a discretionary remedy, the courts will not grant one for interference with the right if this is against the balance of convenience,¹³ later authority in other areas of the law make it clear that an injunction will ordinarily issue.¹⁴

The right includes access to and from the water.¹⁵ On the sea and in other tidal waters this involves the right to go on the shore, i.e. the land between high and

8. *Byron v. Stimpson* (1878), 17 N.B.R. 697.

9. *Pickels v. R.* (1912), 14 Ex. C.R. 379; see also *Merritt v. City of Toronto* (1913), 48 S.C.R. 1.

10. *Pickels v. R.* (1912), 14 Ex. C.R. 379; *Nelson v. Pacific Great Eastern Ry.*, [1918] 1 W.W.R. 597.

11. *Austin v. Snyder* (1861), 21 U.C.Q.B. 299; *Byron v. Stimpson* (1878), 17 N.B.R. 697; *Phair v. Venning* (1882), 22 N.B.R. 362; *Burgess v. City of Woodstock*, [1955] O.R. 814.

12. *Grand Trunk Pacific Ry. v. British Columbia Express Co.* (1916), 55 S.C.R. 328, *per* Duff J. at pp. 339-40; *Baldwin v. Chaplin* (1915), 21 D.L.R. 846; *Nicholson v. Moran*, [1949] 4 D.L.R. 571.

13. *Garret v. Squarebriggs* (1880), 2 P.E.I. 351.

14. See pp. 214, 219-20.

15. *Smith v. Grieve* (1899), 8 Nfld. L.R. 278; *Nelson v. Pacific Great Eastern Ry.*, [1918] 1 W.W.R. 597.

low water mark, for the purpose.¹⁶ And a riparian owner has a right of access over the shoal waters of a lake to the deeper waters where navigation practically begins.¹⁷ No one, not even the Crown, can erect any structure on the shore or otherwise permanently obstruct a riparian owner's right of access.¹⁸ For example, a permanent boom of logs in front of a riparian owner's land or a neighbouring wharf that blocks his access¹⁹ would entitle him to a right of action.²⁰ Indeed, even a temporary interruption can ground an action unless it is in the reasonable exercise of rights by the person causing the obstruction. This will be discussed more fully in examining its relation to the right of navigation.

The riparian owner's right of access exists in a direct line from every point along the whole frontage of his land on the water.²¹ It is, therefore, no answer to an action for damages for obstruction of the right that the owner can get to and from the water from another part of his land.²²

Finally it should be mentioned that an expropriation of property between a riparian owner's land and the water, for example in building a railroad along the shore, amounts to "injurious affection" of the land because the owner loses his right of access, and accordingly the owner may recover compensation for such loss even though none of his property is taken.²³

Relation to Right of Navigation

Where an obstruction occurs in water, interference with the right of access must be distinguished from interference with the exercise by an individual of the public right of navigation. A riparian owner shares with the public generally the right of navigation, but he has in addition his right of access.²⁴ The right of access, as already mentioned, is a private right of property, and an action for interference with it may be brought without proof of damage. To support an action for interference with his exercise of the public right of navigation, however, an individual must be able to show that he has suffered special damages not common to other members of the public; otherwise proceedings for interference with navigation must be by way of indictment or by action by the Attorney-General.²⁵

16. *Byron v. Stimpson* (1878), 17 N.B.R. 697; *Rorison v. Kolossoff* (1910), 13 W.L.R. 629 (reversed on other grounds: (1910), 15 W.L.R. 497).

17. *Stover v. Lavoia* (1906), 8 O.W.R. 398; affirmed: (1907), 9 O.W.R. 117; *Kennedy v. Husband*, [1923] 1 D.L.R. 1069.

18. *Reg. v. Lord* (1864), 1 P.E.I. 245; *Byron v. Stimpson* (1878), 17 N.B.R. 697; *Garret v. Square-briggs* (1880), 2 P.E.I. 351; *Rorison v. Kolossoff* (1910), 13 W.L.R. 629 (reversed on other grounds: (1910), 15 W.L.R. 497); *Nelson v. Pacific Great Eastern Ry.*, [1918] 1 W.W.R. 597; *Kennedy v. Husband*, [1923] 1 D.L.R. 1069.

19. *O'Dwyer v. Tessier* (1859), 4 Nfld. L.R. 278; *Tessier v. O'Dwyer* (1859), 4 Nfld. L.R. 284; *Smith v. Grieve* (1899), 8 Nfld. L.R. 278.

20. See *Drake v. Sault Ste. Marie Pulp and Paper Co.* (1898), 25 O.A.R. 251; *Ireson v. Holt Lumber Co.* (1913), 18 D.L.R. 604.

21. *Reg. v. Lord* (1864), 1 P.E.I. 245; *Byron v. Stimpson* (1878), 17 N.B.R. 697; *Rorison v. Kolossoff* (1910), 13 W.L.R. 629 (reversed on other grounds: (1910), 15 W.L.R. 497).

22. *Byron v. Stimpson* (1878), 17 N.B.R. 697.

23. *Bigaouette v. North Shore Ry.* (1888), 17 S.C.R. 363; *North Shore Ry. v. Pion* (1889), 14 A.C. 612; *In re False Creek Flats Arbitration* (1912), 17 B.C.R. 282; earlier cases had taken the opposite view: *Re Widder and Buffalo and Lake Huron Ry.* (1861), 20 U.C.Q.B. 638; *Reg. v. Buffalo and Lake Huron Ry.* (1864), 23 U.C.Q.B. 208.

24. *Byron v. Stimpson* (1878), 17 N.B.R. 697; *Bell v. Corporation of Quebec* (1879), 5 A.C. 84; *North West Navigation Co. v. Walker* (1885), 3 Man. R. 25; *North Shore Ry. v. Pion* (1889), 14 A.C. 612; *Nelson v. Pacific Great Eastern Ry.*, [1918] 1 W.W.R. 597; *Irving Oil Co. v. Rover Shipping Co.* (1961), 45 M.P.R. 311; *Nicholson v. Moran*, [1949] 4 D.L.R. 571.

25. See pp. 187-90.

The distinction between the right of access and the right to navigation has thus been drawn:

A person who owns premises abutting on a highway enjoys as a private right the right of stepping from his own premises on to the highway and if any obstruction be placed in his doorway or gateway, or if it be a river, at the edge of his wharf, so as to prevent him from obtaining access to his own premises to the highway, that obstruction would be an interference with a private right. But immediately he has stepped on to the highway, what he is using is not a private right, but a public right.²⁶

Consequently an obstruction at some considerable distance from the land, even so as to block access of a riparian owner to certain waters, will not constitute an interference with the right of access. For example, a fisherman living on a navigable river flowing into Lake Superior who was obstructed in his passage to the lake by the defendant's lumber at the mouth of the river could not sue for interference with his right of access, though on proof of special damages, he was able to recover for the damages suffered from the interference with the navigation of the river²⁷.

Difficulties arise, however, when the obstruction is not at the very edge of the property, but at a short distance. Such an obstruction can equally block access to land as one on the edge of it. However if access is made more difficult but not impossible, this will not amount to an interference with the right of access, though it may constitute an obstruction to navigation, as for example where a wharf is not, by reason of some obstruction, as easy to approach or perhaps approachable only by another route.²⁸ An examination of *London v. City of Vancouver*²⁹ where the court went somewhat further than the established law may perhaps best show the line of demarcation. There the defendant had built a bridge, one of the piers of which was sixty feet from the wharf. This made access to a wharf more difficult but not impossible and MacFarlane J. of the Supreme Court of British Columbia held this constituted an interference with the right of access. In the subsequent case of *Nicholson v. Moran*,³⁰ however, a judge of the same court properly disagreed with this conclusion. In the latter case, the plaintiff owned a summer residence on navigable water, and the adjoining riparian owner began a boat repairing business involving use of the fronting water lot. This made it more difficult for larger boats to manoeuvre into the plaintiff's wharf. The court, however, held that this did not constitute an interference with the plaintiff's right of access, and since he was unable to establish special damage he failed in his action. One should not, however, expect complete agreement in all cases, for whether there is an interference with access is a question of fact,³¹ and exact consistency in appreciation of facts is not to be expected.

26. *W. H. Chaplin & Co. v. Westminster Corp.*, [1901] 2 Ch. 329, at p. 334; cited in *Nicholson v. Moran*, [1949] 4 D.L.R. 571, at pp. 575-6.

27. *Drake v. Sault Ste. Marie Pulp and Paper Co.* (1898), 25 O.A.R. 251; see also *Grand Trunk Pacific Ry. v. British Columbia Express Co.* (1916), 55 S.C.R. 328.

28. *Baldwin v. Chaplin* (1915), 21 D.L.R. 846; *Nicholson v. Moran*, [1949] 4 D.L.R. 571; see also *O'Dwyer v. Tessier* (1859), 4 Nfld. L.R. 278; *Tessier v. O'Dwyer* (1859), 4 Nfld. L.R. 284; *Smith v. Grieve* (1859), 8 Nfld. L.R. 278.

29. [1934], 49 B.C.R. 328.

30. [1949] 4 D.L.R. 571.

31. *Bell v. Corporation of Quebec* (1879), 5 A.C. 84; *Baldwin v. Chaplin* (1915), 21 D.L.R. 846.

*Magee v. Reg. and City of Saint John*³² is an instructive case. There the defendant had constructed a trestle on which a railway was built which prevented ships from passing as freely and directly as formerly to the plaintiff's wharf and further prevented larger vessels from docking there because they would extend into the water now occupied by the trestlework. The Exchequer Court of Canada held that the impediment to navigation was not actionable but that the inability of the larger vessels to dock constituted an actionable interference with the plaintiff's right of access.

In many cases, of course, it makes no difference whether an act is categorized as an interference with access or navigation, for the plaintiff may well suffer special damages in cases where it might otherwise be important to draw a distinction between the rights of navigation and access, for as already seen a riparian proprietor is more likely to suffer special damages for an obstruction to navigation near his land.³³ But the distinction is often of importance, as, for example, where persons have been authorized by statute to interfere with the right of navigation.³⁴

The relation of the right of navigation to the right of access when they come in conflict must now be examined. The right of navigation may be exercised even though it interferes with a person's right of access to some extent.³⁵ Thus in *Quiddy River Boom Co. v. Davidson*,³⁶ it was held that a person driving logs down a river might boom them in front of a riparian owner's land for a reasonable time to prevent them from floating out to sea, and to secure them until they could be carried away by tugs, the only practicable way of moving them. Similarly, a ship at anchor for a reasonable time might temporarily block a riparian owner's right of access to his land.³⁷ Again where lumber is in the course of navigation left by the tide between high and low water mark, this does not constitute an unreasonable interference with the rights of a riparian owner if it is removed within a reasonable time.³⁸ The right of navigation must be exercised in a reasonable manner so as not to interfere with the right of access. Reasonableness depends on all the circumstances of the case, such as the quantity of lumber or size of a ship, the tide and the weather; whether an act is reasonable or not cannot, of course, be decided *a priori*.³⁹

Relation to the Public Right of Fishing

It is obvious that under some circumstances an accommodation must be made between the public right of fishing and the right of access. The right of access certainly cannot be permanently blocked by fishing installations,⁴⁰ but the public

32. (1897), 5 Ex. C.R. 391; see also *Robinson v. Reg.* (1895), 4 Ex. C.R. 439; affirmed: (1895), 25 S.C.R. 692.

33. *Bell v. Corporation of Quebec* (1879), 5 A.C. 84; *Drake v. Sault Ste. Marie Pulp and Paper Co.* (1898), 25 O.A.R. 251; this question is discussed in more detail at pp. 188-9.

34. See *Champion and White v. City of Vancouver*, [1918] 1 W.W.R. 216; *Irving Oil Co. v. Rover Shipping Co.* (1961), 45 M.P.R. 311.

35. *Quiddy River Boom Co. v. Davidson* (1866), 25 N.B.R. 580; *McNeil v. Jones* (1894), 26 N.S.R. 299; *Hamilton Steamboat Co. v. MacKay* (1907), 10 O.W.R. 295.

36. (1886), 25 N.B.R. 580.

37. See *McNeil v. Jones* (1894), 26 N.S.R. 299.

38. *Quiddy River Boom Co. v. Davidson* (1886), 25 N.B.R. 580.

39. *Ibid.*; see also *Smith v. Grieve* (1879), 8 Nfld. L.R. 278; *McNeil v. Jones* (1894), 26 N.S.R. 299.

40. See *Rorison v. Kolosoff* (1910), 13 W.L.R. 629 (reversed on other grounds: (1910), 15 W.L.R. 497).

in exercise of its right of fishing may land fish on the seashore⁴¹ or dig for clams,⁴² and such acts may conceivably temporarily obstruct access in a minor degree.

THE RIGHT OF DRAINAGE

There is a right in owners of land adjoining a natural stream to drain their lands in the stream even though this must affect the flow downstream, but the exact extent of the right is still somewhat obscure. In the first place it is not clear whether the right is limited to riparian owners or extends to other landowners as well. In *McGillivray v. Township of Lochiel*⁴³ the court seemed clear that the right was limited to riparian owners. Yet a number of the judges of the Ontario Court of Appeal in *Re Townships of Orford and Howard*⁴⁴ spoke of the right of every landowner to drain his land in any natural watercourse accessible to him. Other cases are simply not clear, but several deal with municipal drainage, which could scarcely be limited to riparian lands.⁴⁵ Perhaps the better approach is to permit all landowners to drain in accessible watercourses, for the natural function of watercourses is to drain land within the drainage area.

In *Re Township of Orford and Howard*,⁴⁶ Maclellan J. A. stated flatly that so long as a landowner acted reasonably he could exercise his right of drainage without concerning himself with the effects produced lower down the stream, even when this results in the overflow of the stream. This also receives support from the Manitoba case of *Romanica v. Greater Winnipeg Water District*.⁴⁷ But there are several Ontario cases, beginning with *Young v. Tucker*⁴⁸ in 1899, which make it clear that an upper landowner may not drain into a natural watercourse a larger volume of water than it can carry off at its natural capacity, and if he does so a person who suffers injury thereby may recover damages or obtain an injunction.

It is possible that the cases may be reconciled. Fundamentally, the right of drainage must be exercised reasonably. It may well be reasonable for a municipality to drain into a natural watercourse which forms part of the St. Lawrence River system even though this results in water overflowing some miles downstream as occurred in *Re Townships of Orford and Howard*. The overflow might well have resulted in any event from natural drainage. But it is another thing to collect water and have it carried by drains into a small pond that is not large enough to hold the additional volume of water as occurred in *Young v. Tucker*.

Whatever doubts there may be about the liability of a landowner for increasing the flow of water downstream from his draining his upstream land, the law

41. *Reg. v. Lord* (1864), 1 P.E.I. 245.

42. *Donnelly v. Vroom* (1907), 404 N.S.R. 585; affirmed: (1909), 42 N.S.R. 327; *Delap v. Hayden* (1924-5), 57 N.S.R. 346.

43. (1904), 8 O.L.R. 446.

44. (1891), 18 O.A.R. 496, per Maclellan J.A., Hagarty C.J.O. and Burton J.A. (diss.).

45. *McGuire v. Township of Brighton* (1912), 7 D.L.R. 314; *Romanica v. Greater Winnipeg Water District* (1921), 31 Man. R. 178; see also *Groat v. City of Edmonton*, [1928] S.C.R. 522.

46. (1891), 18 O.A.R. 496; see also per Hagarty C.J.O. and Burton J.A. (diss.).

47. (1921), 31 Man. R. 178.

48. (1899), 26 O.A.R. 162; appeal quashed: (1899), 30 S.C.R. 185; see also *McGillivray v. Township of Lochiel* (1904), 8 O.L.R. 446; *McGuire v. Township of Brighton* (1912), 7 D.L.R. 314.

regarding pollution is clear. If a landowner pollutes the water, he is liable for damages and he may be enjoined from doing so by injunction. This question is discussed in more detail under "Pollution".⁴⁹ A landowner would not ordinarily be liable, however, where water in its flow carries with it material, for example, oil, naturally in the earth which affects the quality of the water downstream.⁵⁰

RIGHTS RESPECTING FLOW

Introduction

A riparian owner is entitled to certain rights respecting the manner in which water reaches and leaves his land. He is, first of all, entitled to have the water flow down to his land as it has been accustomed to flow, substantially undiminished in quantity and quality, subject to the rights of other riparian owners to use the water, and to the public rights of navigation and floating.⁵¹ This is a natural right inseparably annexed to the land; it is not an easement and cannot be permanently separated from the inheritance.⁵² One of the best statements of the law respecting a riparian owner's rights to the way in which water must reach his land is that of Lord MacNaghten in *John Young & Co. v. Bankier Distillery Co.*,⁵³ which reads as follows:

A riparian owner is entitled to have the water of a stream on which his property lies flow down as it has been accustomed to flow down to his property subject to the ordinary use of the flowing water by upper proprietors, and to such further use as may be reasonable under the circumstances. Every riparian owner is thus entitled to the flow of his stream in its natural flow, and without any substantial alteration in its character or quality.

A riparian owner is also entitled to have the water leave his land without obstruction. Moreover, non-riparian owners are also protected from the use of water that may damage their lives or property by flooding or otherwise.

The various riparian rights relating to the flow of water may conveniently be classified as follows:

- (a) the right to have the water flow in its natural course;
- (b) rights preventing the permanent extraction of water from the stream;
- (c) rights preventing the alteration of the flow to property downstream;
- (d) the right to have the water leave one's land in its accustomed manner.

49. *Van Egmond v. Town of Seaforth* (1884), 6 O.R. 599; *Crowther v. Town of Cobourg* (1912), 1 D.L.R. 40; *Clare v. City of Edmonton* (1914), 26 W.L.R. 678; *Groat v. City of Edmonton*, [1928] S.C.R. 522.

50. *Groat v. City of Edmonton*, [1928] S.C.R. 522, per Lamont J.

51. For statements of the principle, see *Graham v. Burr* (1853), 4 Gr. 1; *Miner v. Gilmour* (1858), 12 Moo. P.C. 131; 14 E.R. 861; *Tucker v. Paren* (1858), 7 U.C.C.P. 269; *McLean v. Davis* (1865), 11 N.B.R. 266; *Steadman v. Robertson* (1879), 18 N.B.R. 580; *Ratté v. Booth* (1886), 11 O.R. 491; affirmed: (1890), 15 A.C. 188; *North Shore Ry. v. Pion* (1889), 14 A.C. 612; *McCann v. Pigeon* (1901), 40 N.S.R. 356; *Saunders v. Wm. Richards Co.* (1901), 2 N.B. Eq. 303; *Leahy v. Town of North Sydney* (1906), 37 S.C.R. 464; *Wade v. Nashwaak Pulp & Paper Co.* (1918), 46 N.B.R. 11; *Canadian Westinghouse Co. v. Hamilton*, [1948] O.R. 144; *McKie v. The K.V.P. Co. Ltd.*, [1948] O.R. 398; affirmed with variation: [1949] 4 D.L.R. 497 (S.Ct.Can.); *Stephens v. Village of Richmond Hill*, [1955] O.R. 806; *Re Faraday Uranium Mines Ltd.*, [1962] O.R. 503.

52. *Tucker v. Paren* (1858), 7 U.C.C.P. 269; *McLean v. Davis* (1865), 11 N.B.R. 266; *Watts v. Robson* (1873), 33 U.C.Q.B. 570; *McCann v. Pigeon* (1901), 40 N.S.R. 356; *Saunders v. Wm. Richards Co.* (1901), 2 N.B. Eq. 303; *Leahy v. Town of North Sydney* (1906), 37 S.C.R. 464.

53. [1893] A.C. 691, at p. 698.

The Right to Have the Water Flow in its Natural Course

A riparian owner is entitled to have the water flow down the stream to his land along its regular channel.⁵⁴ This being a proprietary right, anyone who diverts the water from its regular course may be restrained from doing so without proof of damage, actual or apprehended.⁵⁵ A few examples may be given. In *McLean v. Crosson*,⁵⁶ an upstream owner on whose land a river ran in curves forming "oxbows" dug a low narrow trench near the river during low water in such a way that when the freshet came the river made a new channel in line with the trench. The effect was to deprive the plaintiff, a downstream owner, of the flow of the river along a portion of his land and to wash away one-half acre of his land. The Ontario Court of Appeal held the defendant upstream owner liable, and it made no difference that the river would sooner or later have forced its way through. The court also expressed the view that even if the ditch had been dug in the ordinary course of husbandry, the defendant would have been bound to take precautions to prevent the stream from forcing its way through. Another example is *Diamond v. Coleman*,⁵⁷ where the owner of a downstream mill successfully sued an upstream owner for diversion. Again in *Ellis v. Clemens*,⁵⁸ the defendant was held liable because in restoring water to a stream which he had used, he did so at such times and in such manner that it froze as it was being restored and formed a mass of ice that blocked the stream and forced the water to leave its natural channel and flow onto and damage the plaintiff's land.

A riparian owner may, however, alter the course of a stream on his own land, so long as he returns it to its normal channel without affecting the flow downstream. Thus there is nothing to prevent a landowner from straightening, cleaning out or deepening the channel on his land.⁵⁹ Similarly the diversion of the waters of a stream to a flume or mill-race to operate a mill is permissible.⁶⁰ So too is irrigation.⁶¹ But if the diversion affects the flow to the detriment of a riparian owner downstream, the upstream owner will be liable. For example, in *Soulicky v. City of Sault Ste. Marie*,⁶² the defendant city straightened out a natural watercourse. The plaintiff's land was flooded, and he sued the defendant alleging the flooding occurred because of the alteration in the watercourse. The defendant, however, claimed the flooding occurred because of an unusual rainfall, but the

54. *Hamilton v. Gould* (1864), 24 U.C.Q.B. 58; *McLean v. Crosson* (1873), 33 U.C.Q.B. 448; *Diamond v. Coleman* (1876), 38 U.C.Q.B. 632; *Jenny Lind Co. v. Bradley-Nicholson Co.* (1883), 1 B.C.R., Pt. II, 185; *Ellis v. Clemens* (1892), 22 O.R. 216; *Arthur v. G.T.R.*, (1895), 22 O.A.R. 89; *Leahy v. Town of North Sydney* (1906), 37 S.C.R. 464; *Reynolds v. Hamilton and Dundas St. Ry.* (1919), 16 O.W.N. 4; *Parr v. Troop* (1922), 55 N.S.R. 252; *King v. MacKenzie* (1964), 49 M.P.R. 57.

55. *Ibid.*

56. (1873), 33 U.C.Q.B. 448.

57. (1876), 38 U.C.Q.B. 632.

58. (1892), 22 O.R. 216; see *Reynolds v. Hamilton and Dundas St. Ry.* (1919), 16 O.W.N. 4.

59. See *McGillivray v. Township of Lochiel* (1904), 8 O.L.R. 446; *Romanica v. Greater Winnipeg Water District* (1921), 31 Man. R. 178.

60. *Baird v. Elliott* (1890), Cout S.C. 84; affirming (1879), 26 Gr. 549; *Re Burham* (1895), 22 O.A.R. 40.

61. See *Howatt v. Laird* (1857), 1 P.E.I. 157; *McLean v. Crosson* (1873), 33 U.C.Q.B. 448; *Keith v. Corry* (1877), 17 N.B.R. 400; *Re Burham* (1895), 22 O.A.R. 40; *Watson v. Jackson* (1914), 31 O.L.R. 481; *James v. Town of Bridgewater* (1915), 49 N.S.R. 188; *Good v. Freimark*, [1950] 2 W.W.R. 1156, 1216.

62. [1935] O.W.N. 522.

court nonetheless found the defendant liable. Anyone who interferes with the course of a stream, it was held, must see that the works he substitutes for the natural channel are adequate even when there is an extraordinary rainfall; if the damage results from the deficiency of the substitute he is liable.

Rights Preventing the Permanent Extraction of Water from the Stream

Closely related to the diversion of the course of a stream is the diversion or permanent extraction of water from it. Here the courts have appeared to hold firmly to the principle that the water must be returned to the stream substantially undiminished in quantity and quality.⁶³ Accordingly, one who diverts water for the purpose of irrigating his land must do so without sensibly diminishing the flow of the water downstream.⁶⁴ Similarly in *Maughn v. G.T.R.*,⁶⁵ a railway erected a pumping station on the bank of a stream to supply the needs of its locomotives and of a nearby village. This caused the plaintiff's land fed by the stream to become stagnant and foul. The plaintiff brought action, and the court held that the railway, though a riparian owner, had no right to use the water to the prejudice of the plaintiff for its own use, let alone for the use of the village. Again in *Leahy v. Town of North Sydney*,⁶⁶ the town had taken water for municipal water purposes from Pottle Lake whose outlet was Smelt Brook where the plaintiff owned land, and it was held that the plaintiff was entitled to damages and to an injunction to prevent the diversion.

Of course, the damage must be appreciable—minimal diminution of the quantity of water will not give rise to a claim for legal redress, under the principle of *de minimis non curat lex*.⁶⁷ But as soon as there is a sensible diminution, an action will lie. Thus in one case the abstraction of 1/80 or 1/100 part of the waters in a stream was held sufficient to ground an action;⁶⁸ whether the courts would always be as rigorous may now be open to some question.⁶⁹

Rights Preventing the Alteration of the Nature of the Flow to Property Downstream

A use of water may not alter the total flow downstream, but affect the nature of the flow, by altering the times when the river will flow, by increasing or decreasing the rate of flow, or otherwise. Such action by an upstream owner may, of course, be detrimental to a downstream owner. Consequently, if the principle that a riparian owner is entitled to have the water flow to his land in the manner in which it has been accustomed to flow is interpreted strictly (as once appeared to be

63. See, in addition to the cases discussed, *Bras D'Or Lime Co. v. Dominion Iron and Steel Co.* (1911), 9 E.L.R. 348; *Cook v. Vancouver*, [1914] A.C. 1077; *Johnson v. Anderson* (1936), 51 B.C.R. 413; *Lockwood v. Brentwood Park Investments Ltd.* (1967), 64 D.L.R. (2d) 212.

64. See *Howatt v. Laird* (1857), 1 P.E.I. 157; *Miner v. Gilmour* (1858), 22 Moo. P.C. 131; 14 E.R. 861; *McLean v. Crosson* (1873), 33 U.C.Q.B. 448; *Keith v. Corry* (1877), 17 N.B.R. 400; *Re Burnham* (1895), 22 O.A.R. 40; *James v. Town of Bridgewater* (1915), 49 N.S.R. 188.

65. (1904), 4 O.W.R. 287; see also *Graham v. Northern Ry.* (1863), 10 Gr. 259; *Stanford v. Imperial Oil Co.* (1920), 54 N.S.R. 106.

66. (1906), 37 S.C.R. 464; see also *James v. Town of Bridgewater* (1915), 49 N.S.R. 188.

67. See *Howatt v. Laird* (1850), 1 P.E.I. 7; *Saunders v. William Richards Co. Ltd.* (1901), 2 N.B. Eq. 303; *West Kootenay P. & L. Co. v. Nelson* (1906), 12 B.C.R. 34; *Watson v. Jackson* (1914), 31 O.L.R. 481; *Lockwood v. Brentwood Park Investments Ltd.* (1967), 64 D.L.R. (2d) 212.

68. See *Graham v. Northern Ry. Co.* (1863), 10 Gr. 259.

69. See *Lockwood v. Brentwood Park Investments Ltd.* (1967), 64 D.L.R. (2d) 212.

the case)⁷⁰ the upper riparian owner would be highly restricted in his use of the water. The maintenance of a dam, for instance, would be almost out of the question on many streams. It is true that the principle *de minimis* would prevent actions for the closing of a dam pending the building up of a sufficient head of water to operate a mill or to effect repairs.⁷¹ But the operation of the *de minimis* principle is not sufficient to effect an adequate allocation of the flow of water. Accordingly, the courts have made clear that a riparian owner is entitled to the reasonable use of water in a stream on or adjoining his land, and in making such use they recognize that he must, in many cases, of necessity affect the flow downstream.⁷² This goes well beyond the principle of *de minimis*; even if the lower riparian owner does suffer appreciable injury from the use made of the water the upper riparian owner may make reasonable use of it. Otherwise, the upper riparian owner would not have an equal right with the lower landowner to make use of the water.⁷³

The difficult question, of course, is to determine whether a particular use is reasonable or not. This requires a consideration of all the circumstances, including the size of the stream, the season of the year, the nature of the use and of the operation involved.⁷⁴ To this may be added the state of mechanical and manufacturing advances.⁷⁵ What may be reasonable in regard to one river at one season of the year may be highly unreasonable on another river at a different season. A few examples may be given. In *Keith v. Corry*,⁷⁶ the plaintiff had a mill on a river and the defendant owned another mill upstream. At certain seasons the defendant closed his gates. This was essential to raise a sufficient head to run his mill, but the plaintiff was naturally detrimentally affected by the closure of the dam. The plaintiff admitted that, assuming the defendant had a right to stop the water in this manner, he had not done so in an unreasonable manner. On these facts the Supreme Court of New Brunswick held for the defendant. The case may be contrasted with another New Brunswick case *Brown v. Bathurst Electric and Water Power Co.*⁷⁷ There the defendant, an electric power company, built a dam in connection with their power house upstream from the plaintiff's carding and grist mill. The defendant ran their machinery at night, and in the morning their practice was to store the water until the dam was full again, without regard to the length of time required for the purpose. In consequence, the plaintiff was deprived of water and his mill was forced to shut down for a long number of days at a time. On these facts Barker J. held that the use of the defendant was unreasonable and issued an injunction to prevent its continuance.

70. See *McKechnie v. McKeyes* (1850), 10 U.C.Q.B. 37; *Howatt v. Laird* (1850), 1 P.E.I. 7.

71. *Howatt v. Laird* (1850), 1 P.E.I. 7; *Keith v. Corry* (1877), 17 N.B.R. 400; *Saunders v. William Richards Co. Ltd.* (1901), 2 N.B. Eq. 303; *Watson v. Jackson* (1914), 31 O.L.R. 481.

72. *Hamilton v. Gould* (1864), 24 U.C.Q.B. 58; *Keith v. Corry* (1877), 17 N.B.R. 400; *Dickson v. Carnegie* (1882), 1 O.R. 110; *Saunders v. William Richards Co. Ltd.* (1901), 2 N.B. Eq. 303; *Roy v. Fraser* (1903), 36 N.B.R. 113; *Brown v. Bathurst Electric and Water Power Co.* (1907), 3 N.B. Eq. 543; *Watson v. Jackson* (1914), 31 O.L.R. 481; *Wade v. Nashwaak Pulp & Paper Co. Ltd.* (1918), 46 N.B.R. 11; cf., *Ellis v. Clemens* (1892), 22 O.R. 216.

73. *Keith v. Corry* (1877), 17 N.B.R. 400.

74. *Ibid.*; see also *Brown v. Bathurst Electric and Water Power Co.* (1907), 3 N.B. Eq. 543; *Watson v. Jackson* (1914), 31 O.L.R. 481.

75. *Brown v. Bathurst Electric and Water Co.*, *ibid.*

76. (1877), 17 N.B.R. 400.

77. (1907), 3 N.B. Eq. 543.

In the above cases, liability resulted from an interruption to the flow of water. It can also arise from increasing the rate of flow.⁷⁸ Thus in *Canadian Westinghouse Co. v. Hamilton*,⁷⁹ the defendant municipality straightened the course of a creek by means of a culvert, thereby increasing the velocity of the water and causing stones and debris to be deposited on the bed and sides of the stream to the plaintiff's injury. The defendant was held liable. Here again, however, the rule of reasonableness must be brought into play. One who builds a dam, for example, must of necessity retard or accelerate the natural current.⁸⁰ Thus lumbermen may make dams to increase the volume of water and the force of the current for the purpose of floating their logs, but must do so in a reasonable manner having due regard to the rights of riparian landowners.⁸¹ Thus in *Bathurst Lumber Co. v. Harris*,⁸² the Supreme Court of New Brunswick held a lumberman liable for injury to the intervalle land of an owner caused by artificial floods resulting from the opening of dams erected by the lumberman to assist him in driving down his logs.

Slowing down the rate of flow of a stream may also give rise to an action.⁸³ Here again this is subject to the *de minimis* rule⁸⁴ and the rule of reasonableness.⁸⁵

Increasing the volume of water may also give rise to an action,⁸⁶ subject to the same exceptions as to *de minimis* and reasonableness.⁸⁷ It must, however, be remembered that riparian and perhaps other land-owners have a natural right of drainage and cannot be made liable for increasing the volume of a stream by using it to drain surface waters if they act reasonably.⁸⁸

Finally, it should be pointed out that an upstream owner is not liable for damages suffered by a downstream owner by reason of the upstream owner's doing something to restore the natural flow of water, for example, by removing casual obstructions like timber and driftwood from a stream.⁸⁹

Rights Respecting the Manner in which Water Leaves a Man's Land

A riparian owner has a right to have water leave his land without obstruction. The most frequent sources of obstruction, of course, are dams penning the waters

78. *Howatt v. Laird* (1851), 1 P.E.I. 157; *James Richardson & Co. v. Paradis* (1915), 23 D.L.R. 720; *Canadian Westinghouse Co. v. Hamilton*, [1948] O.R. 144.

79. [1948] O.R. 144.

80. *Howatt v. Laird* (1851), 1 P.E.I. 7; *Keith v. Corry* (1877), 17 N.B.R. 400; *Bathurst Lumber Co. v. Harris* (1919), 46 N.B.R. 411.

81. *James Richardson & Co. v. Paradis* (1915), 23 D.L.R. 720; *Bathurst Lumber Co. v. Harris* (1919), 46 N.B.R. 411; *Hugh W. Simmons v. Foster*, [1955] S.C.R. 324.

82. (1919), 46 N.B.R. 411.

83. *McLean v. Davis* (1865), 11 N.B.R. 266; *Keith v. Corry* (1877), 17 N.B.R. 400; *McDougall v. Town of New Liskeard* (1914), 7 O.W.N. 256.

84. See *West Kootenay P. & L. v. Nelson* (1906), 12 B.C.R. 34.

85. *Keith v. Corry* (1877), 17 N.B.R. 400.

86. *Howatt v. Laird* (1857), 1 P.E.I. 157; *Keith v. Corry* (1877), 17 N.B.R. 400; *McCready v. Gananoque Water Power Co.* (1902), 1 O.W.R. 438.

87. *Howatt v. Laird* (1857), 1 P.E.I. 157; *Keith v. Corry* (1877), 17 N.B.R. 400.

88. *Groat v. City of Edmonton*, [1928] S.C.R. 522; see also pp. 205-6.

89. *Wegenast v. Ernst* (1859), 8 U.C.C.P. 456; *Danard v. Corporation of Chatham* (1875), 24 U.C.C.P. 590; *Parry v. Reid* (1920), 13 Sask. L.R. 219.

back.⁹⁰ The owner of the bed is entitled to build a dam thereon,⁹¹ and an upper owner has no right to complain if he does so or if he raises an existing dam.⁹² But as soon as it obstructs the flow from his land he may bring an action for damages or an injunction. Among the most usual types of damages from such obstruction appearing in the cases are interferences with the working of an upstream owner's mill by obstructing his wheels or reducing the amount of water power on his land,⁹³ or overflowing or flooding his land.⁹⁴ But these are by no means all. It may, for example, be the washing away of a bridge,⁹⁵ or the destruction of water power, (i.e. the power generated by the difference of the level of the water where the stream enters a man's land and when it leaves it),⁹⁶ even if he is not using it,⁹⁷ and it may even be the flooding of a ford.⁹⁸

In fact, the damages to warrant an action for damages or an injunction may be very slight.⁹⁹ No actual damage may be suffered; any interference with property, other than one so negligible as to fall within the principle of *de minimis* will ground an action for damages (which may be nominal where there is no present damage suffered) and for an injunction. Otherwise the lower riparian owner might acquire prescriptive rights to back the water up, preventing the upper owner from later making use of the land as he would otherwise have been able to do. Though there is no immediate damage, therefore, there is technically an injury to the land.¹⁰⁰

90. *McLaren v. Cook* (1847), 3 U.C.Q.B. 299; *Howatt v. Laird* (1850), 1 P.E.I. 7; *Graham v. Burr* (1853), 4 Gr. 1; *Nigh v. Sowerwine* (1854), 12 U.C.Q.B. 67; *Smith v. Wallbridge* (1857), 6 U.C.C.P. 324; *Wright v. Turner* (1863), 10 Gr. 67; *Watson v. Perine* (1863), 13 U.C.C.P. 229; *Dickson v. Burnham* (1868), 14 Gr. 594; varied on other grounds: (1870), 17 Gr. 261; *McNab v. Taylor* (1874), 34 U.C.Q.B. 524; *Breathaur v. Bolster* (1864), 23 U.C.Q.B. 317; *Ahern v. Booth* (1903), 2 O.W.R. 696; affirmed: (1904), 3 O.W.R. 852; *Saunby v. London, (Ont.) Water Commissioners*, [1906] A.C. 110; *Montreal Light, Heat and Power Co. v. Attorney-General of Quebec* (1908), 41 S.C.R. 116; *Crosby v. Yarmouth St. Ry.* (1911), 45 N.S.R. 330; *Weber v. Bowman* (1912), 21 O.W.R. 242; *Girton v. Ontario and Minnesota Power* (1918), 13 O.W.N. 446; *Cook v. Davidson Lumber and Manufacturing Co.* (1920), 53 N.S.R. 375; *Ruthig v. Stewart Brothers Ltd.* (1923), 53 O.L.R. 558; *Desbarres v. Polaris Shipping Co.* (1925), 58 N.S.R. 237; *R. v. Southern Canada Power Co.*, [1937] 3 D.L.R. 737 (P.C.); *Robinson v. Heplett*, [1939] O.W.N. 61; *Kelley v. Canadian Northern Ry.*, [1950] 2 D.L.R. 760; *King v. MacKenzie* (1964), 49 M.P.R. 57.
91. See pp. 234-5.
92. *McLaren v. Cook* (1847), 3 U.C.Q.B. 299; *Nigh v. Sowerwine* (1854), 12 U.C.Q.B. 67; *Beamish v. Barrett* (1869), 16 Gr. 318; *Dominion Textile Co. v. Skaife*, [1927] S.C.R. 59.
93. *McLaren v. Cook* (1847), 3 U.C.Q.B. 299; *Graham v. Burr* (1853), 4 Gr. 1; *Watson v. Perine* (1863), 13 U.C.C.P. 229; *Saunby v. London (Ont.) Water Commissioners*, [1906] A.C. 110.
94. *Wright v. Turner* (1863), 10 Gr. 67; *Dickson v. Burnham* (1868), 14 Gr. 594; reversed on other grounds: (1870), 17 Gr. 261; *Breathaur v. Bolster* (1864), 23 U.C.Q.B. 317; *Girton v. Ontario and Minnesota Power* (1918), 13 O.W.N. 446; *Cook v. Davison Lumber and Manufacturing Co.* (1920), 53 N.S.R. 375; *Desbarres v. Polaris Shipping Co.* (1925), 58 N.S.R. 237; *Robinson v. Heplett*, [1939] O.W.N. 61.
95. *Montreal Light, Heat and Power Co. v. Attorney-General of Quebec* (1908), 41 S.C.R. 116; *R. v. Southern Canada Power Co.*, [1937] 3 D.L.R. 737 (P.C.).
96. *Dickson v. Burnham* (1868), 14 Gr. 594; reversed on other grounds: (1870), 17 Gr. 261; *Re Burnham* (1895), 22 O.A.R. 40; *Ahern v. Booth* (1903), 2 O.W.R. 696; affirmed: (1904), 3 O.W.R. 852.
97. *Ahern v. Booth* (1903), 2 O.W.R. 696; affirmed: (1904), 3 O.W.R. 852.
98. *Ruthig v. Stewart Brothers Ltd.* (1923), 53 O.L.R. 558.
99. *Dickson v. Burnham* (1868), 14 Gr. 594; reversed on other grounds: (1870), 17 Gr. 261; *McNab v. Taylor* (1874), 34 U.C.Q.B. 524; *Weber v. Bowman* (1912), 21 O.W.R. 242.
100. *McKie v. The K.V.P. Co. Ltd.*, [1948] O.R. 398; affirmed with a variation: [1948] O.W.N. 812; affirmed with a variation: [1949] 4 D.L.R. 497 (S.Ct.Can.).

Dams, of course, are not the only structures that may cause damage by penning waters back to the damage of upstream owners. Bridges are a frequent cause of such damage, sometimes in conjunction with ice or log jams that might not otherwise have been formed.¹⁰¹ Of course, if the jams are caused by the negligence of the persons sending the logs or ice down, liability for penning back water and flooding will fall on those persons.¹⁰² Among other structures that may give rise to liability for penning back water are walls,¹⁰³ railways,¹⁰⁴ highways¹⁰⁵ and booms.¹⁰⁶

The onus of proving that the damage has resulted from the defendant's structure, whether a dam, bridge, or otherwise, and not from other causes, such as a freshet, is on the person who alleges it.¹⁰⁷ If the damage would have occurred in any event, the owner of the dam or other structure is not liable. In many cases, of course, the source of the damage is obvious, but the point is important in marginal cases. Where damage would have resulted in any event, but it is increased by the defendant's structure, an apportionment will be made. In one case, for example, it was shown that although the plaintiff's land would have been flooded anyway, he would have been able to begin operating his mill ten days earlier if the defendant's dam had not existed; the court allowed the plaintiff damages for the loss incurred owing to the shutting down of the mill for this additional period.¹⁰⁸ The onus would appear to be on the defendant to show the basis of apportionment; otherwise he will be liable for the whole damage.¹⁰⁹

Damages from the Use of Water Irrespective of Riparian Rights

Damages from the use of water have been discussed in the context of the riparian owner's rights to the natural flow of the stream. But the cases must be examined in the context of a broader principle, applicable to both riparian and non-riparian owners. That principle is this: any person who interferes with the course of a stream has the duty to see that the works he substitutes for the natural channel are adequate to carry the water brought down even by an extraordinary rainfall, and if damage results from the deficiency of the substitute he is liable.¹¹⁰ The cases are also often dealt with in terms of the rule in *Rylands v. Fletcher*:¹¹¹

101. *Patterson v. Town of Peterborough* (1869), 28 U.C.Q.B. 505; *Wigle v. Gosfield South* (1912), 25 O.L.R. 646; *Davies v. Can. Nor. Ont. Ry.* (1920), 19 O.W.N. 194; *Brooks v. Steelton* (1920), 19 O.W.N. 352.
102. *Patterson v. Town of Peterborough* (1869), 28 U.C.Q.B. 505; see also *Hodder v. Turvey* (1873), 20 Gr. 63; *Wade v. Nashwaak Pulp and Paper Co.* (1918), 46 N.B.R. 11.
103. *Foster v. Fowler* (1858), 3 N.S.R. 425; see also *Wigle v. Gosfield South* (1912), 25 O.L.R. 646.
104. *Townsend v. Canadian Northern Ry.* (1922), 65 D.L.R. 85.
105. *Martin v. County of Middlesex* (1913), 4 O.W.N. 1540.
106. *Wade v. Nashwaak Pulp and Paper Co.* (1918), 46 N.B.R. 11.
107. *Wadsworth v. McDougall* (1876), 24 Gr. 1; *Bradley v. Gananoque Water Power Co.* (1903), 2 O.W.R. 716; affirmed: (1904), 3 O.W.R. 913; *Miller v. Beatty* (1906), 7 O.W.R. 605; affirmed: (1907), 8 O.W.R. 326; *Doolittle v. Orillia* (1911), 18 O.W.R. 673; *Smith v. Ontario and Minnesota Power Co.* (1918), 44 O.L.R. 43; *Elliott v. Hewitson* (1919), 16 O.W.N. 364.
108. *Lockhart v. Minnesota and Ontario Power Co.* (1921), 21 O.W.N. 298; see also *Smith v. Ontario and Minnesota Power Co.* (1918), 44 O.L.R. 43.
109. *Kelley v. Canadian Northern Ry.*, [1950] 2 D.L.R. 760, per Sydney Smith J.
110. *Mackenzie v. West Flamborough* (1899), 26 O.A.R. 198; *Wade v. Nashwaak Pulp & Paper Co. Ltd.* (1918), 46 N.B.R. 11; *Smith v. Ontario and Minnesota Power Co.* (1918), 44 O.L.R. 43; *Kelley v. Canadian Northern Ry.* [1950] 2 D.L.R. 760.
111. (1868), 1 Ex. 265; (1863), 3 H.L. 630.

that he who for his own purposes brings on his land anything likely to do injury if it escapes is, subject to certain exceptions, liable for all damage that is the natural consequence of its escape.¹¹² Accordingly, if water is penned back by a dam so as to flood the land of another, whether that other is a riparian owner or not, the owner of the dam is liable. The same is true if a dam is suddenly opened causing flooding or other damage downstream.

Whether the above rules are considered as different formulations of the same principle, or whether they are separate principles is a matter of little importance in many cases. But some difficulty has been experienced in relation to the exceptions to the rule in *Rylands v. Fletcher*, i.e. that liability does not accrue to the landowner for acts of God or malicious actions of a third person.

An act of God may be defined as an accident resulting from a natural cause that could not have been prevented by any reasonable care or foresight.¹¹³ There are a few early cases where owners of dams, bridges or other obstructions have been absolved from liability for flooding by such obstructions where the flooding resulted from an extraordinary rainfall or other unusual weather conditions.¹¹⁴ But it now seems well settled that a person who interferes with the natural course of a stream will not be absolved from damage caused by reason of his dam or other obstruction even if there is an extraordinary rainfall. In the first place it seems doubtful that an extraordinary rainfall would be categorized as an act of God. It can be foreseen that such a rainfall will occur from time to time in most areas of the country. Moreover, the cases indicate that, whatever the situation may be as regards surface waters,¹¹⁵ no one who obstructs a natural watercourse will be absolved from damages caused thereby even where there has been an act of God unless the damage would have occurred whether or not the stream was obstructed.¹¹⁶

The mere fact that a person has obtained competent advice and taken reasonable care to avoid the type of damage that occurred will not absolve him from liability.¹¹⁷ A Quebec case before the Supreme Court of Canada, *Montreal Light, Heat and Power Co. v. Attorney-General of Quebec*,¹¹⁸ exemplifies this statement. There the defendant had constructed works in a river which created a large reservoir where ice formed in larger quantities than before; and during the spring freshet, following a severe winter, the ice was driven with such force against the superstructure of a bridge as to partially demolish it. The defendant was held liable for the damage notwithstanding that it had taken precautions for

112. *Hudson v. Napanee River Improvement Co.* (1914), 31 O.L.R. 47; *Wade v. Nashwaak Pulp & Paper Co. Ltd.* (1918), 46 N.B.R. 11; *Kelley v. Canadian Northern Ry. Co.*, [1950] 2 D.L.R. 760.

113. See *Nugent v. Smith* (1876), 1 C.P.D. 423.

114. *Pinkerton v. Greenock* (1906), 8 O.W.R. 967; *Hudson v. Napanee River Improvement Co.* (1914), 31 O.L.R. 47.

115. For the discussion of the rule respecting surface waters, see p. 402.

116. *Greenock Corporation v. Caledonian Ry.*, [1917] A.C. 556; *Wade v. Nashwaak Pulp & Paper Co.* (1918), 46 N.B.R. 11; *Smith v. Ontario and Minnesota Power Co.* (1918), 44 O.L.R. 43; *Brooks v. Steelton* (1920), 19 O.W.N. 352; *Townsend v. Canadian Northern Ry.*, (1922), 65 O.L.R. 85; *Kelley v. Canadian Northern Ry.*, [1950] 2 D.L.R. 760.

117. *Montreal Light, Heat and Power Co. v. Attorney-General of Quebec* (1908), 41 S.C.R. 116; *Martin v. County of Middlesex* (1913), 4 O.W.N. 1540.

118. (1908), 41 S.C.R. 116.

the protection of the bridge against such possibilities, and that the formation of the ice in increased weight and thickness resulted from an unusually severe winter.

The exception from liability for the acts of a malicious third party is strongly exemplified by *Hudson v. Napanee River Improvement Co.*¹¹⁹ in the Ontario Court of Appeal. There the defendant's dam was destroyed by the malicious act of an unknown person, and as a result the plaintiff's son was drowned while driving on a bridge lower down. There was bad feeling in the area because of the erection of the dam, and it had been attacked before. But the court held the defendant not liable. He was under no obligation to have a watchman.

Remedies

A riparian owner whose right to have water flow to or from his land in its accustomed manner is interfered with may sue in an action for damages. If he suffers substantial damage, he will receive damages accordingly. But if his right is merely interfered with and he suffers no actual damage, he is entitled to at least nominal damages.¹²⁰

At one time an injunction would not be granted where the plaintiff merely showed an interference with his legal rights; he had further to show actual loss or inconvenience of a substantial character. The question the courts asked was whether the injury suffered was susceptible of adequate compensation by damages.¹²¹ Nowadays, however, *de minimis* apart if the plaintiff can establish that he is suffering a legal injury that could ripen into an easement by prescription—for example, that the flow of water to his land is interfered with, or that his water power is affected by penning the water back, even if he is not using it—he will be entitled to an injunction to restrain the interference as a matter of course.¹²² Thus in *Wright v. Turner*,¹²³ the defendant built a mill by which waters were forced back and overflowed two acres of adjoining land damaging it to the extent of two pounds per annum. The small amount of the damage was held not to be a sufficient reason for withholding an injunction. In special cases, however, an injunction will not be granted—where the damage is capable of being adequately compensated by a small money payment and an injunction would be oppressive to the defendant.¹²⁴ Nor will an injunction be granted where the damage suffered is not of a recurring kind or is unlikely to happen except at rare intervals. This was the ground for the refusal of an injunction in *Davies v. Canadian Northern Ont. Ry.*¹²⁵ where the plaintiff's bricks and brickyard suffered damage from spring flood waters dammed back by the defendant's bridge.

119. (1914), 31 O.L.R. 47.

120. See *McKie v. The K.V.P. Co. Ltd.*, [1948] O.R. 398; affirmed with a variation: [1948] O.W.N. 812; affirmed with a variation: [1949] 4 D.L.R. 497 (S.Ct.Can.).

121. *Howatt v. Laird* (1851), 1 P.E.I. 21; *Graham v. Burr* (1853), 4 Gr. 1, *per* Esten V.C. (diss.); *Graham v. Northern Ry.* (1863), 10 Gr. 259.

122. *Graham v. Burr* (1853), 4 Gr. 1; *Wright v. Turner* (1863), 10 Gr. 67; *McNab v. Taylor* (1874), 34 U.C.Q.B. 524; *Ahern v. Booth* (1903), 2 O.W.R. 696; affirmed: (1904), 3 O.W.R. 852; *McKie v. The K.V.P. Co. Ltd.*, [1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4 D.L.R. 497 (S.Ct.Can.).

123. (1863), 10 Gr. 67.

124. See *Lockwood v. Brentwood Park Investments Ltd.* (1967), 64 D.L.R. (2d) 212.

125. (1920), 19 O.W.N. 194.

One early Prince Edward Island case, *Howatt v. Laird*,¹²⁶ shows how the court's discretionary power to grant injunctions could be used as a device for allocating the water resources of a stream. There the plaintiff built a mill on a stream where some ten years before the defendant had also built one higher up the stream. The natural flow of water was insufficient at certain seasons to drive the mills, and the defendant daily shut the gates of his dam, stopping water for a considerable portion of the time and thereby interfering with its natural flow to the plaintiff's mill. The plaintiff recovered damages¹²⁷ and then sought an injunction.¹²⁸ The court granted him the injunction, but limited its operation to a certain period at night. The effect was to secure to each party reasonable participation in the common resource. In a later action when it was shown that the defendant did not need to hold the water back for as long a period as was allowed in the original injunction, a second injunction was granted compelling him to keep the gates open for a longer period.¹²⁹ At the time this case was decided, however, the courts took a more rigid approach to the rule that the lower landowner was entitled to have the water flow down in its accustomed manner substantially undiminished in quantity and quality.¹³⁰ Nowadays, it is clear that this is subject to the upstream owner's right to make reasonable use of the water.¹³¹ Accordingly, judicial allocation of the waters of a stream could be based on that principle.

Easements and Prescriptive Rights

A person may, of course, enter into a contract with another permitting him to increase or decrease the flow of water in a stream, or to overflow the other's land or otherwise interfere with the latter's common law rights. Such contracts may create personal obligations between the parties only. But it is possible to create rights respecting the flow or penning back of water that runs with the land (both the land to be benefitted and the land upon which the burden rests). Such rights are called easements.¹³² For example, it is possible for the owner of the bed of a stream to acquire an easement to overflow the land of an upstream owner by means of a dam; such right then continues no matter who owns the land benefitted or burdened. It is beyond the scope of this study to examine the law of easements in any detail. It suffices to say that such rights may, if sufficiently defined, be acquired by grant, from the owner of the land subject to the burden, to the owner of the land for the benefit of which the right exists. Something must, however, be said of the acquisition of easements by long user or prescription.

A person who makes use of water in a manner that involves the proprietary rights of another person may, if he continues the uninterrupted use of the water for the period required under the Easements Act or by prescription under the

126. (1851), 1 P.E.I. 7, 21, 157.

127. (1851), 1 P.E.I. 7.

128. (1851), 1 P.E.I. 21.

129. (1857), 1 P.E.I. 157.

130. See pp. 208-9.

131. See pp. 209-10.

132. For a discussion of easements of water, see Coulson and Forbes on *Waters and Land Drainage*, 6th ed. (London, 1952), c. IV; for some Canadian examples, see *Rutton v. Winans* (1855), 5 U.C.C.P. 379; *Wilson v. Sinclair* (1856), 8 N.B.R. 343; *Gooderham v. Routledge* (1864), 10 Gr. 398; *Hendry v. English* (1871), 18 Gr. 119; *Young v. Wilson* (1874), 21 Gr. 144, 611; *Malcolm v. Hunter* (1884), 6 O.R. 102; *Union Bank of Canada v. Foulds* (1924), 26 O.W.N. 179.

fiction of lost modern grant—usually twenty years—acquire the right to do so.¹³³ Thus one may acquire a prescriptive right to have water flow in an artificial channel.¹³⁴ Again a person who pens back water onto another person's land for the prescribed period acquires the right to do so.¹³⁵ And the right to hold back the flow may equally be acquired against the person downstream.¹³⁶ However, no prescriptive right is acquired by a person doing what he is authorized to do in the exercise of his riparian rights.¹³⁷

A prescriptive right is confined to the right as actually exercised, and any subsequent excess beyond the right acquired will give rise to an action.¹³⁸ Thus in *McNab v. Adamson*¹³⁹ the defendant had a prescriptive right to dam a stream, but was held liable for putting up more erections obstructing the water in the stream. Again in *McKechnie v. McKeyes*,¹⁴⁰ where a dam had been in existence to serve a mill for over the prescribed period, but the water had been used only for one or two months a year when the water was high and no injury or detention occurred, it was held that such use would not support a prescriptive right to pen back water in such a manner as to prevent the plaintiff from operating his mill lower down the stream. Moreover, it is not the height of the dam that is relevant, but the extent to which a person claiming a prescriptive right has enjoyed the privilege. What is relevant is the extent to which the property of the person against whom the privilege is claimed is affected, not the structure placed on the claimant's land to take advantage of that privilege.¹⁴¹ Consequently, a person who for the prescribed period

133. It is beyond the scope of this study to examine in any detail the nature of the use required to obtain a prescriptive right of easement. Suffice it to say that it must be uninterrupted use as of right. The use is not as of right, for example, when the person making the use does so with the permission of the owner of the burdened land; see *Malcolm v. Hunter* (1884), 6 O.R. 102; *Hunter v. Richards* (1912), 26 O.L.R. 458; affirmed: (1913), 28 O.L.R. 267. In the case of prescription under the Easements Act, the prescribed period must be measured from the time the action is brought, so it must still be exercised at the time, but prescription at common law may relate to a period that took place before the action is brought so long as it has not been abandoned; see, *inter alia*, *McKechnie v. McKeyes* (1850), 10 U.C.Q.B. 37; *Watson v. Jackson* (1914), 31 O.L.R. 481; *Abbell v. Village of Woodbridge and County of York* (1917), 39 O.L.R. 383; reversed on other grounds: (1919), 45 O.L.R. 79; reversed: (1920), 61 S.C.R. 345. In England there is also common law prescription where it can be shown that a right existed from time immemorial, defined to be the commencement of the reign of Richard I. Obviously this has no application to Canada where the courts rely either on Easements Acts or the fiction of lost modern grant; see *Grand Hotel Co. v. Cross* (1879), 44 U.C.Q.B. 153; *Abbell v. Village of Woodbridge and County of York*, *supra*.

134. *Abbell v. Village of Woodbridge and County of York* (1917), 39 O.L.R. 383; reversed on other grounds: (1919), 45 O.L.R. 79; reversed: (1920), 61 S.C.R. 345; see also *Malcolm v. Hunter* (1884), 6 O.R. 102.

135. *McLaren v. Cook* (1874), 3 U.C.Q.B. 299; *Buell v. Read* (1847), 5 U.C.Q.B. 546; *McNab v. Adamson* (1849), 6 U.C.Q.B. 100; *McKechnie v. McKeyes* (1850), 10 U.C.Q.B. 37; *Bechtel v. Street* (1860), 20 U.C.Q.B. 15; *McLean v. Davis* (1865), 11 N.B.R. 266; *Lawlor v. Potter* (1869), 12 N.B.R. 328; *Campbell v. Young* (1871), 18 Gr. 97; *Roy v. Fraser* (1903), 36 N.B.R. 113; *Weber v. Bowman* (1912), 21 O.W.R. 242; *Carter v. Suddaby*, [1927] 1 D.L.R. 812.

136. See *Hunt v. Hespeler* (1957), 6 U.C.C.P. 269; *Bras D'Or Lime Co. v. Dominion Iron & Steel Co.* (1911), 9 E.L.R. 348; *Watson v. Jackson* (1914), 31 O.L.R. 481.

137. *Brown v. Bathurst Electric and Water Power Co.* (1907), 3 N.B. Eq. 543.

138. *Buell v. Read* (1847), 5 U.C.Q.B. 546; *McNab v. Adamson* (1849), 6 U.C.Q.B. 100; *McKechnie v. McKeyes* (1850), 10 U.C.Q.B. 37; *Lawlor v. Potter* (1869), 12 N.B.R. 328; see also *Hendry v. English* (1871), 18 Gr. 119.

139. (1849), 6 U.C.Q.B. 100.

140. (1850), 10 U.C.Q.B. 37; see also *Lawlor v. Potter* (1869), 12 N.B.R. 328.

141. *Ibid.*; *Hunt v. Hespeler* (1857), 6 U.C.C.P. 269; *Bechtel v. Street* (1860), 20 U.C.Q.B. 15; *Cain v. Pearce Co.* (1911), 18 O.W.R. 595.

has had a dam capable of holding back a height of say ten feet of water, but has, in fact, held back a height of only eight feet acquires only a right to raise the water the latter height, and will be liable for raising it higher.¹⁴² The courts will, however, presume that the water was as high at the beginning of the period in the absence of proof, and it is not necessary for the defendant to show that the water was backed up at all times, it being sufficient that it was done whenever necessary for his purposes.¹⁴³ Conversely, the mere fact that he erects a dam to replace one in respect of which he has acquired a prescriptive right that is higher than the preceding dam will not subject him to an action unless he, in fact, raises the water to a higher level.¹⁴⁴ It follows, too, that once a person acquires a prescriptive right respecting the water, he may, as the preceding sentence suggests, alter the instrument by which he exercises the right.¹⁴⁵ Equally he may alter the use he makes of the right; thus in early cases owners of prescriptive rights to dam water were held entitled, for example, to replace a clover mill with a saw mill or a grist mill, and so on.¹⁴⁶ And a short interruption of the use, as where a mill or a dam is rebuilt within a reasonable time, will not affect the right.¹⁴⁷ However, an easement may be lost by abandonment; otherwise one who made use of a stream where such an unused right existed might be put to very heavy costs.¹⁴⁸

Statutory Power

Statutory power is frequently given to interfere with the flow of water when a development of any magnitude is planned on a stream. In such cases the procedure prescribed in the statute for such interference must be strictly followed; otherwise a riparian owner will have his common law rights to maintain his action preserved intact.¹⁴⁹ In *Leahy v. Town of North Sydney*,¹⁵⁰ the defendant municipality was, *inter alia*, authorized by statute to enter lands and beds of water, to cause water to overflow, and to take necessary water for a water distribution system. But such action was predicated on the municipality's submitting to arbitration, if need be, to determine compensation. Failure to comply with this step made the municipality liable for a diversion causing injury to the plaintiff. Otherwise the defendant would, in effect, have power to expropriate without statutory authority.

Generally, statutory powers are interpreted so as to interfere as little as possible with the common law and proprietary rights of others.¹⁵¹ Thus in *Brown v.*

142. *Cain v. Pearce Co.* (1911), 18 O.W.R. 595.

143. *Bechtel v. Street* (1860), 20 U.C.Q.B. 15.

144. *Ibid.*

145. *McKechnie v. McKeyes* (1850), 10 U.C.Q.B. 37; *McLean v. Davis* (1865), 11 N.B.R. 266.

146. *McKechnie v. McKeyes* (1850), 10 U.C.Q.B. 37.

147. *McLean v. Davis* (1865), 11 N.B.R. 266.

148. *Ibid.*

149. *Leahy v. Town of North Sydney* (1906), 37 S.C.R. 464; *Saunby v. London (Ont.), Water Commissioners*, [1906] A.C. 110; *James v. Town of Bridgewater* (1915), 49 N.S.R. 188; see also *S.S. Eureka v. Burrard Inlet Tunnel and Bridge Co.*, [1931] A.C. 300; *Bulman v. Anderson, Booth and Green* (1946), 63 B.C.R. 297.

150. (1906), 37 S.C.R. 464.

151. *Canadian Pacific Ry. v. Parke*, [1899] A.C. 535; *Brown v. Bathurst Electric and Water Power Co.* (1907), 3 N.B. Eq. 543; *Leahy v. Town of North Sydney*, (1906), 37 S.C.R. 464; *Miller and Thompson v. Halifax Power Co.* (1913), 47 N.S.R. 334; *Johnson v. Anderson* (1936), 51 B.C.R. 413; *Cook v. Davison Lumber and Manufacturing Co.* (1920), 53 N.S.R. 375; *Desbarres v. Polaris Shipping Co.* (1925), 58 N.S.R. 237; *Lethbridge Northern Irrigation District v. Maunsel*, [1926] S.C.R. 603.

*Bathurst Electric and Water Power Co.*¹⁵² the statutory authorization given the defendant to build a dam was held not to entitle it to unreasonably interfere with the flow of water to the plaintiff's land. Moreover, if a work is authorized, it must be executed without negligence, and negligence includes so constructing a work that it causes damage where this could have been prevented by a reasonable exercise of the powers.¹⁵³ However, if a person is authorized to do something by statute, and it is properly done, he is under no liability to anyone who suffers injury thereby unless a remedy is provided by statute.¹⁵⁴

POLLUTION

Riparian Right to Undiminished Quality

In the statement of the rights of a riparian owner in *John Young and Co. v. Bankier Distillery Co.*,¹⁵⁵ cited in connection with rights respecting the flow of water, Lord Macnaghten concludes by saying that such owner is entitled to have the water reach his land "without sensible alteration in its character or quality." In other words a riparian owner is entitled to the flow of water in its natural state—unpolluted. Accordingly riparian owners have maintained actions for pollution against upper riparian owners when the pollution has resulted from such diverse causes as privies,¹⁵⁶ mines,¹⁵⁷ sawdust slabs and other mill refuse,¹⁵⁸ dumped clay,¹⁵⁹ drains,¹⁶⁰ salt factories,¹⁶¹ sewage systems,¹⁶² sewage plants,¹⁶³ and tanneries.¹⁶⁴ And damages have been recovered or injunctions obtained for interference with the plaintiff's source of drinking water for domestic purposes or to water stock,¹⁶⁵ with his ability to run a paper mill because the water was discoloured by clay,¹⁶⁶ or a saw mill because the water was blocked by slabs;¹⁶⁷ damages have equally been awarded for detrimentally affecting fishing on,¹⁶⁸ or the

152. (1907), 3 N.B. Eq. 543.

153. *Canadian Westinghouse Co. v. Hamilton*, [1948] O.R. 144.

154. See *James v. Rural Municipality of West Kildonan* (1956), 63 Man. R. 474.

155. [1893] A.C. 691, at p. 698.

156. *City of Saint John v. Barker* (1906), 3 N.B. Eq. 358.

157. *Nepisiquit Real Estate and Fishing Co. v. Iron Corp.*, (1913), 42 N.B.R. 387; *Salvas v. Bell*, [1927] 4 D.L.R. 1099; see also *Re Faraday Uranium Mines Ltd.*, [1962] O.R. 503.

158. *Austin v. Snider* (1861), 21 U.C.Q.B. 299; *Mitchell v. Barry* (1867), 26 U.C.Q.B. 416; *McKie v. The K.V.P. Co. Ltd.*, [1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4 D.L.R. 497 (S.Ct.Can.).

159. *Fisher & Son v. Doolittle & Wilcox Ltd.* (1912), 22 O.W.R. 445.

160. *Van Egmond v. Town of Seaforth* (1884), 6 O.R. 599; *Donovan v. Township of Lochiel* (1905), 5 O.W.R. 222, 785.

161. *Van Egmond v. Town of Seaforth* (1884), 6 O.R. 599.

162. *Clare v. City of Edmonton* (1914), 26 W.L.R. 678; *Batt v. City of Oshawa* (1926), 59 O.L.R. 520; *Groat v. City of Edmonton*, [1928] S.C.R. 522.

163. *Weber v. Town of Berlin* (1904), 8 O.L.R. 302; *Burgess v. City of Woodstock*, [1955] O.R. 814; *Stephens v. Village of Richmond Hill*, [1956] O.R. 88; *Howrich v. Holden Village* (1960), 32 W.W.R. 491.

164. *Weber v. Township of Berlin* (1904), 8 O.L.R. 302.

165. *Van Egmond v. Town of Seaforth* (1884), 6 O.R. 599; *City of Saint John v. Barker* (1906), 3 N.B. Eq. 358; *Clare v. City of Edmonton* (1914), 26 W.L.R. 678; *Burgess v. City of Woodstock*, [1955] O.R. 814.

166. *Fisher & Son v. Doolittle & Wilcox Ltd.* (1912), 22 O.W.R. 445.

167. *Austin v. Snyder* (1861), 21 U.C.Q.B. 299; see also *Mitchell v. Barry* (1867), 26 U.C.Q.B. 416.

168. *Nepisiquit Real Estate and Fishing Co. v. Canadian Iron Corp.* (1913), 42 N.B.R. 387; *McKie v. The K.P.V. Co. Ltd.*, [1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4 D.L.R. 497 (S.Ct.Can.).

agricultural quality of, the lower riparian owner's land.¹⁶⁹ While the alteration in the character of the water must be appreciable or sensible to give a cause of action to a riparian owner, it need not amount to pollution in the ordinary sense of the word. Thus if the operations of an upper riparian make soft water hard, as for example by adding hard water from a mine, even if it is pure, this will be actionable at the suit of a lower riparian owner.¹⁷⁰

Damages need not be sustained by a riparian owner to entitle him to an action for pollution of the waters. For his right to receive the water substantially in its natural state is a property right appurtenant to his land.¹⁷¹ However, in the absence of proof of damage he will be limited to nominal damages. But, even in the absence of damages, an injunction will be issued to a riparian owner as a matter of course if he establishes that the water has been polluted.¹⁷² Otherwise the offending party might over time acquire a prescriptive right to introduce the offensive material in the stream.¹⁷³ Only when there is something special in the case will an injunction be refused, and the plaintiff limited to damages.¹⁷⁴ This will occur where the injury to the plaintiff is small, capable of being estimated and adequately compensated in money, and it would be oppressive to the defendant to grant the injunction.¹⁷⁵

The relative social or economic importance of the activity sought to be enjoined will not, the courts have said, affect their discretion in granting the injunction.¹⁷⁶ For example, in *McKie v. The K.V.P. Co. Ltd.*¹⁷⁷ an injunction was granted enjoining a kraft mill from depositing waste from the mill in a stream which had the effect of reducing the number of fish in the stream where the plaintiff owned the bed. Similarly, in *Crowther v. Town of Cobourg*,¹⁷⁸ a municipality was enjoined from discharging sewage in a stream flowing through the plaintiff's land even though this might mean that a vast population might suffer. Otherwise the result would, in effect, be that a man would be compelled to sell his property interests for a compensation to be awarded by the court, thus leaving those with economic power to do what they pleased without regard to property rights. Only Parliament or the legislature may authorize such a result. However,

169. *Weber v. Town of Berlin* (1904), 8 O.L.R. 302; *Salvas v. Bell*, [1927] 4 D.L.R. 1099.

170. *John Young & Co. v. Bankier Distillery Co.*, [1893] A.C. 691; cited in *Crowther v. Town of Cobourg* (1912), 1 D.L.R. 40.

171. *Mitchell v. Barry* (1867), 26 U.C.Q.B. 416.

172. *City of Saint John v. Barker* (1906), 3 N.B. Eq. 358; *Crowther v. Town of Cobourg* (1912), 1 D.L.R. 40; *McKie v. The K.V.P. Co. Ltd.*, [1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4 D.L.R. 497 (S.Ct.Can.).

173. *Ibid.*; see also *Mitchell v. Barry* (1867), 26 U.C.Q.B. 416; *Hunter v. Richards* (1912), 26 O.L.R. 458; affirmed: (1913), 28 O.L.R. 267.

174. *McKie v. The K.V.P. Co. Ltd.*, [1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4 D.L.R. 497 (S.Ct.Can.); *Stephens v. Village of Richmond Hill*, [1956] O.R. 88; *Howrich v. Holden Village* (1960), 32 W.W.R. 491; *Re Faraday Uranium Mines Ltd.*, [1962] O.R. 503.

175. *Howrich v. Holden Village* (1960), 32 W.W.R. 491; see also *Stephens v. Village of Richmond Hill*, [1956] O.R. 88.

176. *Van Egmond v. Town of Seaforth* (1884), 6 O.R. 599; *Crowther v. Town of Cobourg* (1912), 1 D.L.R. 40; *McKie v. The K.V.P. Co. Ltd.*, [1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4 D.L.R. 497 (S.Ct.Can.); *Stephens v. Village of Richmond Hill*, [1955] O.R. 806; affirmed: [1956] O.R. 88.

177. [1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4 D.L.R. 497 (S.Ct.Can.).

178. (1912), 1 D.L.R. 40.

an injunction will frequently be stayed for a certain period, often up to two or three years, to give the defendant the opportunity to reorganize his works so as not to cause the injury.¹⁷⁹

It is no defence against a riparian owner that the defendant's action by itself would not be sufficient to do any damage,¹⁸⁰ nor that the water was already polluted when the offensive matter was introduced.¹⁸¹ Otherwise the plaintiff would have no remedy when there are several wrongdoers. This can be illustrated by *City of Saint John v. Barker*.¹⁸² There the city sought an injunction to restrain an upper riparian owner from allowing outhouses to drain into Loch Lomond which flows into a river on the banks of which it owned lands and from which it obtained part of the city's water supply. Though Barker J. concluded that the amount of deleterious matter introduced into the water was too small to do any harm, he nonetheless granted the injunction; for, as he put it, if all the upper riparian owners did the same the water would become polluted. It does not matter, either, in the absence of statute, that the work causing the pollution is as carefully done as possible to avoid pollution.¹⁸³

Rights Against Pollution Irrespective of Riparian Rights

The most obvious remedy available to a person, other than a riparian owner, who suffers damage from the pollution of a stream is an action in nuisance. Indeed at one time it could be stated that, generally speaking, a person who was not a riparian owner had no claim at common law against another for polluting a stream unless the pollution created a nuisance.¹⁸⁴ With the development of negligence as a generalized tort since *Donaghue v. Stevenson*,¹⁸⁵ however, an action on that ground may well lie in any circumstance where the courts are willing to hold that a person who pollutes a stream is under a duty to another who suffers damage from that pollution.

If pollution results in a nuisance, several procedures are available to have the nuisance abated. What amounts to a nuisance, however, must first be examined. To constitute a nuisance the act complained of must be such as to interfere substantially with the enjoyment of a person's land. What amounts to a substantial interference is measured by ordinary modes and standards of everyday living, not fanciful and fastidious ones. In *McKie v. The K.V.P. Co. Ltd.*,¹⁸⁶ for example, a foul smell emanating from a river polluted by waste from a kraft mill was held to amount to a nuisance.

179 *Nepisquit Real Estate and Fishing Co. v. Canadian Iron Corp.* (1913), 42 N.B.R. 387; *Clare v. City of Edmonton* (1914), 26 W.L.R. 678; *Groat v. City of Edmonton*, [1928] S.C.R. 522; *McKie v. The K.V.P. Co. Ltd.*, [1948] O.R. 398; affirmed: [1948] O.W.N. 812; [1949] 4 D.L.R. 497 (S.Ct.Can.).

180 *City of Saint John v. Barker* (1906), 3 N.B. Eq. 358; *Crowther v. Town of Cobourg* (1912), 1 D.L.R. 40; *McKie v. The K.V.P. Co. Ltd.*, [1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4 D.L.R. 497 (S.Ct.Can.).

181 *McKie v. The K.V.P. Co. Ltd.*, [1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4 D.L.R. 497 (S.Ct.Can.).

182. (1906), 3 N.B. Eq. 358.

183. *McKie v. The K.V.P. Co. Ltd.*, [1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4 D.L.R. 497 (S.Ct.Can.).

184. *City of Saint John v. Barker* (1906), 3 N.B. Eq. 358.

185. [1932] A.C. 562.

186. [1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4 D.L.R. 497 (S.Ct.Can.).

If the nuisance interferes with a private right it is a private nuisance for which the person may bring an action. Where a nuisance amounts to an interference with a public right, such as the public right of fishing or navigation,¹⁸⁷ the Attorney-General, as already explained,¹⁸⁸ may proceed either by way of indictment¹⁸⁹ or by action.¹⁹⁰ This will ordinarily be brought at the suit of the provincial Attorney-General, but where matters coming within the legislative competence of the Dominion are involved, such as the public rights of navigation or fishing, or public harbours, the suit may be brought by the Attorney-General of Canada.¹⁹¹ If, however, a person suffers special damages not common to the public generally, he may bring an action.¹⁹² In such cases, the plaintiff is not limited to damages related to the public duty. Thus in *Watson v. Toronto Gaslight and Water Co.*,¹⁹³ the court made it clear that the plaintiff could have succeeded in an action for nuisance for polluting navigable waters, though his use of the waters was not for navigating but for distilling whiskey. As in the case of an action for interference with riparian rights, it is no defence to an action in nuisance for pollution that what the defendant himself did was not sufficient to cause a nuisance but only became so because a number of other persons polluted the river.¹⁹⁴ As in the case of actions for violating riparian rights, an injunction may also be available, and what has been said above concerning this remedy is equally applicable here.

Pollution by Municipalities

Pollution of streams frequently arises in connection with drainage and sewage systems of municipalities. There is no question that municipalities like other land-owners have the right to drain their lands, but this gives them no right to pollute streams.¹⁹⁵ For example, in *Groat v. City of Edmonton*¹⁹⁶ the city had constructed a large storm sewer having its outlet in an arm of a stream above the plaintiff's land. The primary purpose of the sewer was to carry off excess waters from the streets in the vicinity, but it not only discharged surface water into the stream but all the filth from the street, including a mass of dirt that accumulated in the winter and washed into the stream in the spring. The Supreme Court of Canada held that while the municipality had at common law the right to drain its lands, it was not permitted to collect and discharge filth off the streets through an artificial channel into a natural stream to the detriment of a riparian owner. Accordingly the court granted an injunction against the city in favour of the plaintiff.

187. *Ibid.*

188. See pp. 187-90.

189. *Attorney-General of Canada v. Ewen* (1895), 3 B.C.R. 468; *Filion v. New Brunswick International Paper Co.* (1934), 8 M.P.R. 89.

190. See, for example, *Attorney-General of Canada v. Brister*, [1943] 3 D.L.R. 50.

191. *Attorney-General of Canada v. Ewen* (1895), 3 B.C.R. 468.

192. *Clare v. City of Edmonton* (1914), 26 W.L.R. 678; *Batt v. City of Oshawa* (1926), 59 O.L.R. 520; *Suzuki v. Ionian Leader*, [1950] Ex. C.R. 427.

193. (1847), U.C.Q.B. 158; see also *McCann v. Pidgeon* (1901), 40 N.S.R. 356.

194. *Attorney-General of Canada v. Ewen* (1895), 3 B.C.R. 468; *City of St. John v. Barker* (1906), 3 N.B. Eq. 358; *McKie v. The K.V.P. Co. Ltd.*, [1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4 D.L.R. 497 (S.Ct.Can.).

195. *Van Egmond v. Town of Seaforth* (1884), 6 O.R. 599; *Crowther v. Town of Cobourg* (1912), 1 D.L.R. 40; *Clare v. City of Edmonton* (1914), 26 W.L.R. 678; *Groat v. City of Edmonton*, [1928] S.C.R. 522.

196. [1928] S.C.R. 522.

It is no defence to a municipality that the offensive material is actually put in its sewage system by a third party if the material is conducted to the stream by means of the municipality's works. For example, in *Crowther v. Town of Cobourg*,¹⁹⁷ the town had laid a drainage tile leading to a stream for draining part of the town west of the stream. The stream was polluted because a number of the houses connected with the system emptied water closets into the drain. A lower riparian owner brought action and recovered damages and an injunction. If the law were otherwise a riparian owner would be compelled to bring an action against each of the individuals who contributed to the pollution.

Statutory Power

Though municipalities or other public or private organizations are in no better position than an individual who pollutes a stream, they are frequently given statutory power to construct works such as sewage systems. In such a case, the courts lean against an interpretation that would give power to create a nuisance or interfere with private rights. Only when it is absolutely necessary to the performance of the work authorized by the statute will a court so read it.¹⁹⁸ Absolutely necessary does not refer to what is theoretically possible, but what is possible according to the scientific knowledge of the time having regard to a common sense appreciation of the practical feasibility of the situation, and expense.¹⁹⁹ Authorization to cause a nuisance would probably more easily be inferred when a statute authorizes a particular work at a definite location. But a mere permissive power, for example, to construct a sewage disposal plant will almost certainly not be read as authorizing a nuisance or an interference with private rights.²⁰⁰ From the foregoing it follows, *a fortiori*, that a lease of land by a provincial government to a private individual for a certain purpose will give that person no authority to pollute a stream to the detriment of a lower riparian owner.²⁰¹

Sometimes a statute authorizing works contains specific provisions respecting damages resulting from such works. A municipality will not be able to resist a common law action on the ground that the common law remedy is replaced by the statutory provisions unless the municipality acted squarely within the statutory authorization.²⁰² Moreover the tendency appears to be to retain the common law remedy, at least where it is more effective. For example, in *Attorney-General of Canada v. Ewen*²⁰³ an action for an injunction was brought to prevent the defendant from dumping fish offal from a fish cannery into the Fraser River. The defendant argued that the injunction would not lie because his activities were

197. (1912), 1 D.L.R. 40; see also *Van Egmond v. Town of Seaforth* (1884), 6 O.R. 599; *Weber v. Town of Berlin* (1904), 8 O.L.R. 302; *Batt v. City of Oshawa* (1926), 59 O.L.R. 520.

198. *Van Egmond v. Town of Seaforth* (1884), 6 O.R. 599; *Weber v. Town of Berlin* (1904), 8 O.L.R. 302; *Stephens v. Village of Richmond Hill*, [1955] O.R. 806; affirmed: [1956] O.R. 88; *Burgess v. City of Woodstock*, [1955] O.R. 814; *Howrich v. Holden Village* (1960), 32 W.W.R. 491.

199. *Stephens v. Village of Richmond Hill*, [1955] O.R. 806; affirmed: [1956] O.R. 88.

200. *Van Egmond v. Town of Seaforth* (1884), 6 O.R. 599; *Stephens v. Village of Richmond Hill*, [1955] O.R. 806; affirmed: [1956] O.R. 88; *Burgess v. City of Woodstock*, [1955] O.R. 814.

201. *Nepisiguit Real Estate and Fishing Co. v. Canadian Iron Corp.* (1913), 42 N.B.R. 387.

202. *Groat v. City of Edmonton*, [1928] S.C.R. 522; *Stephens v. Village of Richmond Hill*, [1955] O.R. 806; affirmed: [1956] O.R. 88; *Burgess v. City of Woodstock*, [1955] O.R. 814.

203. (1895), 3 B.C.R. 468; see also *Howrich v. Holden Village* (1960), 32 W.W.R. 491.

punishable by statute. The court agreed that an Act may take away a common law action for damages by substituting a statutory action with a definite remedy, but this did not take away the power of the court to grant an injunction. Moreover it held that what was affected there were rights independent of statute—the right of the public to pure air and water, and the public right of fishing.

A statute will frequently provide for compensation for land taken or injuriously affected by a work authorized by the statute. The courts have held that where the riparian rights of a landowner are injured, for example by polluting the waters, his lands are injuriously affected for the purposes of the statute and he may recover compensation even though none of his land is taken.²⁰⁴

Occasionally, too, the courts will give a right of action for damages against a person for breach of a statutory duty. Thus in *Suzuki v. Ionian Leader*²⁰⁵ an action was brought to recover damages to the plaintiff's fishing net from the discharge of oil from a stranded ship. The court upheld the claim, holding, *inter alia*, that the plaintiff had a right of action because of the defendant's breach of a statutory duty imposed by section 33 of the Fisheries Act, 1932 which prohibited the dumping of deleterious substances into fishing waters. The dumping of oil was also contrary to a by-law of the Harbour Commissioners of New Westminster made under their special Act, but the court found it unnecessary to decide whether a breach of a by-law gives rise to an action for damages.

One further point should be noted in relation to statutory powers. Where an organization is given the right to use a body of water for a particular purpose, it has substantially similar rights thereto as a riparian owner, whether or not it owns any riparian land. Thus in *City of Saint John v. Barker*,²⁰⁶ where the city had statutory power to obtain its water supply from a river flowing out of Loch Lomond, Barker J. held that the city would have been entitled to an injunction against persons placing offensive material in the lake even if it had not been a riparian owner. He also referred to *Swindon Water Works v. Wilts and Berks Canal*²⁰⁷ where a canal company was authorized by statute to take water from any source within 2,000 yards of the canal, but was unable to do so because of the large quantity of water taken by a riparian owner. The court held that the canal company was in a position similar to a riparian owner and could obtain an injunction against the upper riparian owner whether or not the canal company owned any adjacent land.

USES OF WATER

A riparian owner does not own the water in a running stream, but he may make use of it as it passes his property.²⁰⁸ Since he does not own the water he cannot grant it, though he can grant an easement to another landowner to take

204. *Re Faraday Uranium Mines Ltd.*, [1962] O.R. 503.

205. [1950] Ex. C.R. 427.

206. (1906), 3 N.B. Eq. 358.

207. (1875), 7 H.L. 697.

208. *Howatt v. Laird* (1850), 1 P.E.I. 7; *Reg. v. Meyers* (1853), 3 U.C.C.P. 305; *Tucker v. Paren* (1858), 7 U.C.C.P. 269; *Hamilton v. Gould* (1864), 24 U.C.Q.B. 58; *Whelan v. McLachlan* (1865), 16 U.C.C.P. 269; *Keewatin Power Co. v. Town of Kenora* (1906), 13 O.L.R. 237; reversed on other grounds: (1908), 16 O.L.R. 184; *McKie v. The K.V.P. Co. Ltd.*, [1948] O.R. 398; affirmed with a variation: [1948] O.W.N. 812; affirmed with a variation: [1949] 4 D.L.R. 497 (S.Ct.Can.).

the water.²⁰⁹ The extent of his rights depends on whether the use he makes of water may be classified as an ordinary or an extraordinary use.²¹⁰

Ordinary uses are restricted to the use of water for drinking purposes, watering stock and other domestic purposes such as washing.²¹¹ If in making use of water for ordinary purposes, a riparian owner completely exhausts the supply,²¹² he is not liable to a lower riparian owner. The use must be closely related to the adjoining land.²¹³ Thus the use of water for the supply of locomotives is not an ordinary use.²¹⁴ It cannot be used for supplying water at a distance whether for persons or animals or industrial purposes. Accordingly, the supply of water from a stream for municipal purposes must be authorized by statute.²¹⁵

A riparian owner may also make use of the water for extraordinary purposes. Here again, however, it must be incident to the enjoyment of his property.²¹⁶ What amounts to an extraordinary purpose will depend on the general conditions in the area and the uses to which the stream has previously been put. A common example is the use of water for running a mill.²¹⁷ Another is irrigation.²¹⁸ Unlike a person who uses water for ordinary purposes, one who uses it for extraordinary purposes must restore it to the stream substantially undiminished in quantity and quality.²¹⁹ There is no right of first appropriation.²²⁰

But the use of water for extraordinary purposes will frequently interfere with the manner in which it reaches land lower down the stream. If, for example, a riparian owner dams a stream, its flow will periodically be interrupted. For injury so caused he is liable if, having regard to all the circumstances, he has acted unreasonably. Whether the courts would hold that a particular use is reasonable or unreasonable cannot be easily predicted ahead of time.

Liability will also be incurred by a riparian owner who pollutes or otherwise alters the quality of the water, for example, in operating a pulp mill, or substantially reduces the volume of the water, for example, in irrigating his land. More-

209. *Wilson v. Sinclair* (1856), 8 N.B.R. 343; *Grand Hotel Co. v. Cross* (1879), 44 U.C.Q.B. 153; *McKay v. Bruce* (1891), 20 O.R. 709; *Cronkhite v. Miller* (1901), 2 N.B.R. 203; *Union Bank v. Foulds* (1924), 26 O.W.N. 179.

210. *Miner v. Gilmour* (1858), 12 Moo. P.C. 131; 14 E.R. 861; *Graham v. Northern Ry.* (1863), 10 Gr. 259; *Keith v. Corry* (1877), 17 N.B.R. 400; *North Shore Ry. v. Pion* (1899), 14 A.C. 612; *Brown v. Bathurst Electric and Water Power Co.* (1907), 3 N.B. Eq. 543; *Bras D'Or Lime Co. v. Dominion Iron & Steel Co.* (1911), 9 E.L.R. 348; *Watson v. Jackson* (1914), 31 O.L.R. 481; *James v. Town of Bridgewater* (1915), 49 N.S.R. 188.

211. *Keith v. Corry* (1877), 17 N.B.R. 400; *North Shore Ry. v. Pion* (1889), 14 A.C. 612; *Brown v. Bathurst Electric and Water Power Co.* (1907), 3 N.B. Eq. 543; *James v. Town of Bridgewater* (1915), 49 N.S.R. 188.

212. *Keith v. Corry* (1877), 17 N.B.R. 400; *James v. Town of Bridgewater* (1915), 49 N.S.R. 188.

213. *Maughn v. G.T.R.* (1904), 4 O.W.R. 287; *Graham v. Northern Ry.* (1863), 10 Gr. 259.

214. *Maughn v. G.T.R.* (1904), 4 O.W.R. 287.

215. *Graham v. Northern Ry.* (1863), 10 Gr. 259; *Watson v. Jackson* (1914), 31 O.L.R. 481.

216. *Brown v. Bathurst Electric and Water Power Co.* (1907), 3 N.B. Eq. 543; *James v. Town of Bridgewater* (1915), 49 N.S.R. 188.

217. *Keith v. Corry* (1877), 17 N.B.R. 400.

218. See *Howatt v. Laird* (1857), 1 P.E.I. 157; *Miner v. Gilmour* (1858), 12 Moo. P.C. 131; 14 E.R. 861; *McLean v. Crosson* (1873), 33 U.C.Q.B. 448; *Keith v. Corry*, (1877), 17 N.B.R. 400; *Re Burnham* (1895), 22 O.A.R. 40; *James v. Town of Bridgewater* (1915), 49 N.S.R. 188.

219. See pp. 206, 208.

220. *Graham v. Burr* (1853), 4 Gr. 1; *Miner v. Gilmour* (1858), 12 Moo. P.C. 131; 14 E.R. 861; *McLean v. Davis* (1865), 11 N.B.R. 266; *McKie v. The K.V.P. Co. Ltd.*, [1948] O.R. 398; affirmed with a variation: [1948] O.W.N. 812; affirmed with a variation: [1949] 4 D.L.R. 497 (S.Ct.Can.).

over, once water is drawn from the stream, it becomes surface water, and liability may result in accordance with the law regulating the flow of such water.²²¹

A riparian owner's right to use water is subject to the similar rights of other riparian owners.²²² It is also subject to the public rights of navigation, floating and fishing, and to the rights of the owner of the bed.²²³

The truth is that the common law is geared to simpler times when there were small sawmills, grist mills and the like, not to the modern technological age. For this, and other reasons, it is usual to obtain statutory power whenever it is desired to undertake works of considerable magnitude, as for example, a pulp mill or hydro-electric development on a river. But the provision of even one such statutory permission may well destroy the underpinnings of the common law system of water allocation. For if, for example, water reaches a lower riparian owner's land in a polluted state owing to a pulp mill and he cannot bring action against the owners of the pulp mill because of a statutory exemption, there will usually be little point in bringing action against other persons who may pollute the stream, and so these others acquire the right to do so by prescription. In time many thus acquire the right as against other riparian owners to pollute streams. The same is true, perhaps to a lesser extent, of interferences with the rate and regularity of flow.

ACCRETION

Nature and Rationale

The owner of land bounded by any body of water, whether it be the sea²²⁴ or a tidal river²²⁵ or lake,²²⁶ or an inland river²²⁷ or lake²²⁸, is entitled to any extension of land on the side of the water arising by accretion. There are two types of accretion. One is created by the gradual and imperceptible deposit of alluvium on the banks of a riparian owner's land.²²⁹ The other results from the gradual and

221. *McBryan v. C.P.R.* (1899), 29 S.C.R. 359. See pp. 379-81, 382-7, 388-98, 402-4.

222. *Dickson v. Carnegie* (1882), 1 O.R. 110; see also the cases dealing with flow at pp. 206-15, 218-20.

223. See Chapters Eight and Ten.

224. *Esson v. Mayberry* (1841), 1 N.S.R. 186; *McDougall v. McDougall* (1915), 49 N.S.R. 101; *Paul v. Bates* (1934), 48 B.C.R. 473; *Attorney-General of British Columbia v. Neilson*, [1956] S.C.R. 819.

225. *Municipality of Queen's Co. v. Cooper*, [1946] S.C.R. 584.

226. *McDougall v. McDougall* (1915), 49 N.S.R. 101.

227. *Flewelling v. Johnston* (1921), 59 D.L.R. 419; *Clarke v. City of Edmonton*, [1930] S.C.R. 137; *Re Maile and Toronto*, [1932] O.R. 75; *Bruce v. Johnson*, [1954] 1 D.L.R. 571.

228. *Throop v. Cobourg and Peterboro Ry.* (1856), 5 U.C.C.P. 509; affirmed: (1857) 2 O.A.R. 212n; *Buck v. Cobourg and Peterboro Ry.* (1857), 5 U.C.C.P. 552; *Burke v. Niles* (1870), 13 N.B.R. 166; *Dixson v. Snetsinger* (1873), 23 U.C.C.P. 235; *McCormick v. Municipal Corp. of Pelée* (1890), 20 O.R. 288; *Herrimon v. Pulling & Co.* (1906), 8 O.W.R. 149; *Stover v. Lavoie* (1906), 8 O.W.R. 398; affirmed: (1907), 9 O.W.R. 117; *Toronto General Trusts Corp. v. Delany* (1914), 12 O.W.R. 1116; *Fares v. R.*, [1932] S.C.R. 78; *Volcanic Oil and Gas Co. v. Chaplin* (1914), 31 O.L.R. 364; *Re Snow and City of Toronto* (1924), 56 O.L.R. 100; *Re Bulman* (1966), 57 D.L.R. (2d) 658.

229. *Doe d. McDonald v. Cobourg Harbour* (1844), Rob. & Harr. Dig. 148; Can. Abridg., vol. 1, col. 18; *Throop v. Cobourg and Peterboro Ry.* (1856), 5 U.C.C.P. 509; affirmed: (1857) 2 O.A.R. 212n; *Standly v. Perry* (1879), 3 S.C.R. 356; *Flewelling v. Johnston* (1921), 59 D.L.R. 419; *Re Snow and City of Toronto* (1924), 56 O.L.R. 100; *Clarke v. City of Edmonton*, [1930] S.C.R. 137; *Municipality of Queen's County v. Cooper*, [1946] S.C.R. 584; *Wolfe v. B.C. Elec. Co.*, [1949] 1 W.W.R. 1123; *Bruce v. Johnson*, [1954] 1 D.L.R. 571; *Attorney-General of British Columbia v. Neilson*, [1956] S.C.R. 819.

imperceptible recession of the waters to a lower level.²³⁰ In either case, the additional dry land belongs to the adjoining owner.²³¹ Correspondingly the gradual erosion of the land or the encroachment of the water upon it will vest the ownership of the land thus covered with water in the owner of the bed.²³² Accretion and erosion will also affect ownership even where the riparian owner owns *ad medium filum aquae*, for the centre will vary as the river changes its course.²³³

Different judges have perceived varying reasons for the doctrine. Some believe the rule rests on the impossibility of identifying the change,²³⁴ others in the idea that the owner is entitled to all the natural advantages of his land,²³⁵ and others in the general utility of giving it to the adjoining owner so that it may be turned to useful purposes.²³⁶ Others still see in it a principle of reciprocity: the owner is entitled to all accessions to his land since he must bear the burden of encroachments,²³⁷ but as Rand J. has stated, the owner always has the power to take steps to prevent corrosion but it is difficult to see how the Crown or other owner of the bed can prevent withdrawal of land from water.²³⁸ Though the Supreme Court of Canada has stated that the right of access does not underlie the rule,²³⁹ it must have played a part in its creation. In any event, these underlying reasons form no part of the rule, whatever part they may have played in establishing it.²⁴⁰

The right of accretion is, as mentioned, one of the riparian rights naturally incident to land bordering on water. On a conveyance of the land, therefore, it passes to the grantor without specific mention even though it took place before the grant.²⁴¹

230. *Throop v. Cobourg and Peterboro Ry.* (1856), 5 U.C.C.P. 509; affirmed: (1857), 2 O.A.R. 212n; *Buck v. Cobourg and Peterboro Ry.* (1857), 5 U.C.C.P. 552; *Burke v. Niles* (1870), 13 N.B.R. 166; *McDougall v. McDougall* (1915), 49 N.S.R. 101; *Cuthill v. Lloyd* (1920), 18 O.L.R. 352; *Flewelling v. Johnson* (1921), 59 D.L.R. 419; *Fares v. R.*, [1932] S.C.R. 78; *Municipality of Queen's County v. Cooper*, [1946] S.C.R. 584; *Bruce v. Johnson*, [1954] 1 D.L.R. 571; *Attorney-General of British Columbia v. Neilson*, [1956] S.C.R. 819.

231. See the cases cited in notes 224 to 230. In *Re Maile and Toronto*, [1932] O.R. 75, the Ontario Court of Appeal sought to make a distinction between accretion by alluvial deposit and by recession, but such a distinction is untenable in the light of the many cases above cited.

232. *Throop v. Cobourg and Peterboro Ry.* (1856), 5 U.C.C.P. 509; affirmed: (1857), 2 O.A.R. 212n; *McCormick v. Municipal Corp. of Pelée* (1890), 20 O.R. 288; *Volcanic Oil and Gas Co. v. Chaplin* (1912), 27 O.L.R. 34, 484; reversed on facts: (1914), 31 O.L.R. 364; *Fares v. R.*, [1929] Ex. C.R. 144; reversed on other grounds: [1932] S.C.R. 78; *Municipality of Queen's County v. Cooper*, [1946] S.C.R. 584; *Bruce v. Johnson*, [1954] 1 D.L.R. 571; *Attorney-General of British Columbia v. Neilson*, [1956] S.C.R. 819.

233. *Shey v. McHefey* (1868), 7 N.S.R. 350; *McKay v. Huggan* (1892), 24 N.S.R. 514; *Massey-Harris Co. v. Elliott* (1902), 1 O.W.R. 65; *Cummings v. Dundas* (1907), 13 O.L.R. 384; *Purity Springs Water Co. v. R.* (1920), 17 O.W.N. 455; affirmed: (1921), 19 O.W.N. 287. (In these cases the boundary line was not altered because the alteration of the river's course was sudden and perceptible.) See also *Boyd v. Fudge* (1965), 46 D.L.R. 679.

234. *Cummings v. Dundas* (1907), 13 O.L.R. 384; *Volcanic Oil and Gas Co. v. Chaplin* (1912), 27 O.L.R. 34, 484; reversed on facts: (1914), 31 O.L.R. 364; *Municipality of Queen's County v. Cooper* [1946] S.C.R. 584; *Attorney-General of British Columbia v. Neilson* [1956] S.C.R. 819.

235. *Brenner v. Bleakley* (1923), 54 O.L.R. 233.

236. *Attorney-General of British Columbia v. Neilson*, [1956] S.C.R. 819, *per* Rand J.

237. *Esson v. Mayberry* (1841), 1 N.S.R. 186; *Mayor, etc., of St. John v. Smith* (1854), 8 N.B.R. 103; *Reg. v. Lord* (1864), 1 P.E.I. 245; *Throop v. Cobourg and Peterboro Ry.* (1856), 5 U.C.C.P. 509; affirmed: (1857), 2 O.A.R. 212n; *Volcanic Oil and Gas Co. v. Chaplin* (1912), 27 O.L.R. 34, 484; reversed on facts: (1914), 31 O.L.R. 364.

238. *Attorney-General of British Columbia v. Neilson*, [1956] S.C.R. 819.

239. *Municipality of Queen's County v. Cooper*, [1946] S.C.R. 584.

240. *Attorney-General of British Columbia v. Neilson*, [1956] S.C.R. 819.

241. *Wolfe v. B. C. Elec. Ry.*, [1949] 1 W.W.R. 1123.

Change Must be Gradual

To give rise to an accretion, the change must take place gradually and imperceptibly. And the same is true of an erosion. Imperceptible here means imperceptible in its progress, not imperceptible at the end of a period. A piece of accreted or eroded land may be quite extensive and so perceptible in that sense, but it may be impossible from hour to hour or day to day to perceive its development, and so it is imperceptible in that sense. The key word is "gradual".²⁴² Thus accretion must be distinguished from a sudden change in the course of a stream or the level of the sea or other water resulting in the creation of new areas of dry land or in the encroachment by water on what was formerly *terra firma*. In such a case, the boundary does not change, but remains as it was before. This applies where the boundary is the median line of a river ²⁴³ as well as where the boundary is at the edge of water.²⁴⁴ Land so swallowed up, even by the sea, continues to belong to the owner, however long it may remain covered, so long as it can be ascertained by reasonable marks or the quantity can be known, though perhaps after a great length of time it may be considered as abandoned. Accordingly the owner may take steps to reclaim the land, or if it later naturally becomes dry land it belongs to him.²⁴⁵

It is easy enough to characterize avulsions or irruptions, or the sudden changing of the course of a river as a result of a flood, freshet or the breaking of a dam or other violent changes as not being gradual or imperceptible. But in some cases it is difficult to draw the line. In *Yukon Gold Co. v. Boyle Concessions Ltd.*,²⁴⁶ the waters of a river encroached on the land at the rate of 25 feet per year. This was owing to the fact that the land was principally composed of muck and so could not resist the action of the water caused by melting snow. It was argued that the erosion was gradual and imperceptible since the bank was gradually and imperceptibly undermined, though the surface itself suddenly gave way. But the argument was rejected because it is through gradual undermining that sudden erosion commonly takes place. In *Mahon v. McCully*,²⁴⁷ the proprietors of dyke land had built a breakwater to reclaim land covered by navigable waters and in ten or eleven years a considerable area had been reclaimed and, in fact, in three years the proprietors had begun to reap the benefit of their work. It was held that

242. *Throop v. Cobourg and Peterboro Ry.* (1856), 5 U.C.C.P. 509; affirmed: (1857), 2 O.A.R. 212n; *Shey v. McHefey* (1868), 7 N.S.R. 350; *Massey-Harris Co. v. Elliott* (1902), 1 O.W.R. 65; *Flewelling v. Johnston* (1921), 59 D.L.R. 419; *Clarke v. City of Edmonton*, [1930] S.C.R. 137.

243. *Shey v. McHefey*, (1868), 7 N.S.R. 350; *McKay v. Huggan* (1892), 24 N.S.R. 514; *Massey-Harris v. Elliott* (1902), 1 O.W.R. 65; *Cummings v. Dundas* (1907), 13 O.L.R. 384.

244. *Reg. v. Lord* (1864), 1 P.E.I. 245; *Attorney-General v. Perry* (1865), 15 U.C.C.P. 329; *Standly v. Perry* (1877), 2 O.A.R. 195; affirmed: (1879), 3 S.C.R. 356; *County of York v. Rolls* (1900), 27 O.A.R. 72; *Volcanic Oil and Gas Co. v. Chaplin* (1912), 27 O.L.R. 34, 484; reversed on facts: (1914), 31 O.L.R. 364; *Purity Springs Water Co. v. R.* (1920), 17 O.W.N. 455; affirmed: (1921), 19 O.W.N. 387; *Flewelling v. Johnston* (1921), 59 D.L.R. 419; *Clarke v. City of Edmonton*, [1930] S.C.R. 137; *Municipality of Queen's County v. Cooper*, [1946] S.C.R. 584; *Attorney-General of British Columbia v. Neilson*, [1956] S.C.R. 819.

245. See *Volcanic Oil and Gas Co. v. Chaplin* (1912), 27 O.L.R. 34, 484; reversed on facts: (1914), 31 O.L.R. 364.

246. [1919] 3 W.W.R. 144, per Fitzpatrick C.J., and see in the court below; (1916), 23 B.C.R. 103, per Galliher J.A.

247. (1868), 7 N.S.R. 323.

the reclaimed land was not an accretion. The court compared this with *R. v. Yarborough*²⁴⁸ where an addition to land from natural causes of 5½ yards annually over a period of twenty-six or twenty-seven years was held to be an accretion.

The fact that the extension to land takes place at particular times of the year does not prevent it from constituting an accretion. In *Clarke v. City of Edmonton*²⁴⁹ it was held immaterial that the additional land may have resulted from seasonal floods occurring during a few days each year where such floods were a normal occurrence, even though the additional land was created in a relatively short period—twelve to fifteen years. The process being imperceptible from moment to moment, the riparian owner gained the additional land from day to day as an accretion.

Artificially Induced Accretion

Accreted land belongs to a riparian owner notwithstanding that it may have been contributed to by artificial works such as wharves.²⁵⁰ Some cases assert that this is so notwithstanding that the work was intentionally created to produce accretion,²⁵¹ but others deny the character of accretion to extensions of land resulting from artificial works constructed for the purpose.²⁵² It is probably a question of degree. It is one thing for a man to construct a cribwork on the foreshore to detain seaweed or other substances which may, over time, be incorporated into dry land.²⁵³ It is another to dump quantities of material into an area which becomes dry land by the combined accumulation of the material and accretions by the operation of nature.²⁵⁴ As in other cases the determining factor is probably whether the land is formed gradually and imperceptibly, or whether it is formed at a rate that can more aptly be characterized as sudden.²⁵⁵ The case of *Mahon v. McCully*,²⁵⁶ already discussed, where alluvium penned back by a breakwater resulting in land that became useful in three years and completely dry in ten was held not to constitute an accretion, is helpful in indicating the line of demarcation. It goes without saying, too, that there may be cases where it is difficult to say whether new formed land is primarily the result of accretion or of dumping, artificial works and the like.²⁵⁷

248. (1824), 3 B. & C. 91; 107 E.R. 668; affirmed: (1828), 2 Bligh (N.S.) 147; 4 E.R. 1087.

249. [1930] S.C.R. 137.

250. *Doe d. Macdonald v. Cobourg Harbour* (1844), Rob & Harr. Dig. 148; Can. Abridg., vol. 1, col. 18; *Throop v. Cobourg and Peterboro Ry.* (1856), 5 U.C.C.P. 509; affirmed: (1857), 2 O.A.R. 212n; *Reg. v. Lord* (1864), 1 P.E.I. 245; *Standly v. Perry* (1879), 3 S.C.R. 356; *Coleman v. Robertson* (1880), 30 U.C.C.P. 609; *Clarke v. City of Edmonton*, [1930] S.C.R. 137; *Bruce v. Johnston*, [1954] 1 D.L.R. 571.

251. *Throop v. Cobourg and Peterboro Ry.* (1856), 5 U.C.C.P. 509; affirmed: (1857), 2 O.A.R. 212n; *Reg. v. Lord* ((1864), 1 P.E.I. 245.

252. *Coleman v. Robertson* (1880), 30 U.C.C.P. 609; *Clarke v. City of Edmonton*, [1930] S.C.R. 137; *Bruce v. Johnston*, [1954] 1 D.L.R. 571.

253. See *Reg. v. Lord* (1864), 1 P.E.I. 245.

254. *Mayor, etc. of St. John v. Smith* (1854), 8 N.B.R. 103; *Standly v. Perry* (1879), 3 S.C.R. 356; *Haggerty v. Latreille* (1913), 14 D.L.R. 532; *Twin City Ice Co. v. Ottawa* (1915), 34 O.L.R. 358.

255. *Mahon v. McCully* (1868), 7 N.S.R. 323; *Standly v. Perry* (1879), 3 S.C.R. 356; *Cummings v. Dundas* (1907), 13 O.L.R. 384.

256. (1868), 7 N.S.R. 323; see also *Attorney-General v. Perry* (1865), 15 U.C.C.P. 329.

257. *Mayor, etc. of St. John v. Smith* (1854), 8 N.B.R. 103; *Standly v. Perry* (1879), 3 S.C.R. 356.

Accretion at Formative Stage

Land in the process of formation does not belong to the riparian owner until the process is completed.²⁵⁸ It must have ceased to form part of the bed and become attached to the bank; it must be connected with the riparian owner's land. Until then it continues to belong to the owner of the bed.²⁵⁹ Any channel or other barrier between the upland and the new formed land prevents accretion.

The stage at which accretion is completed in an inland river or lake is a question of fact. On the sea or other tidal waters, there is the further qualification that the new land must be above high water mark. *Attorney-General of British Columbia v. Neilson*²⁶⁰ provides a strong example. There by alluvial action land had been raised from the bed of the sea extending a considerable distance from the riparian owner's land. The land was marshy at low tide but at high tide it was covered by two inches to two feet of water, though the part bordering on the sea formed a rampart of higher ground and there was higher ground bounding the channels in which the water penetrated inland. The trial judge and the British Columbia Court of Appeal concluded that the land constituted an accretion. The high water mark test in their view was not decisive, the real test being whether the land was cultivable (which it was held this was), and while ordinarily the question of cultivability could be determined by reference to the high water mark, this was not always so. This conclusion was reversed by the Supreme Court of Canada. The test of high water mark, then, is an absolute test on tidal waters. The underlying policy of the rule may well be that the high water mark ordinarily forms the line of cultivable land, but that policy forms no part of the rule itself.²⁶¹ The rampart could not be created as an accretion because it was separated from the riparian owner's land by the marsh property, which still constituted part of the bed. Locke and Nolan JJ., however, raised, without pronouncing themselves, a difficulty inherent in early English authority: whether the land above high water mark belongs to the adjoining owner because it is cultivable—or maniorable (manurable) to use the language of the early authorities—or whether it is necessary for the adjoining owner to enter on the land and improve it, thus gaining title by occupation. It is suggested that requiring the owner to occupy the additional land would raise all sorts of difficulty in determining the exact line of demarcation, and Rand J.'s approach of regarding the high water mark rule as arbitrary seems much the better one and more consistent with the underlying reasons for the rule discussed earlier.

Islands

It follows from the fact that new lands must be connected to the riparian lands to constitute an accretion, that newly formed islands continue to belong to

258. *Williams v. Pickard* (1908), 15 O.L.R. 655; reversed on other grounds: (1908), 17 O.L.R. 547; *Attorney-General of British Columbia v. Neilson*, [1956] S.C.R. 819; *Re Bulman* (1966), 57 D.L.R. (2d) 658.

259. *Dixon v. Snetsinger* (1873), 23 U.C.C.P. 235; *Dunphy v. Williams* (1874), 15 N.B.R. 350; *Bruce v. Johnson*, [1954] 1 D.L.R. 571; *Attorney-General of British Columbia v. Neilson*, [1956] S.C.R. 819; *Re Bulman* (1966), 57 D.L.R. (2d) 658.

260. [1956] S.C.R. 819; reversing [1955] 5 D.L.R. 56, which affirmed (1954), 13 W.W.R. (N.S.) 241.

261. See also *Re Bulman* (1966), 57 D.L.R. (2d) 658.

the owner of the bed.²⁶² But the presence of islands can give rise to special problems. In *Municipality of Queen's County v. Cooper*,²⁶³ the municipality owned an island in the Saint John River where it is tidal and navigable and the respondent, Cooper, owned lands on the river above the head of the island. At the time of the grant there was a narrow channel between Cooper's land and the island and he had access to the water. By accretion, however, Cooper's land had extended upstream into a junction with the easterly part of the island, which had also been extended by alluvium. The junction was now indicated by a wet, though apparent, depression. Cooper claimed title to the entire accretion on both sides of the depression as an accretion to the mainland, or in the alternative, that he was entitled to rights over it to maintain his riparian privileges. But the Supreme Court of Canada upheld the municipality's contention that it owned the accreted land on its side up to the depression, notwithstanding that the effect was to cut Cooper's access to the water and thereby deprive him of his former riparian privileges. In the court's view a riparian owner's privilege was subject to changes of nature; the right of access was not the underlying basis of accretion.

In the *Queen's County* case, the island had been in existence at the time of the original grant and had been conveyed to the riparian owner. In *Bruce v. Johnson*,²⁶⁴ however, gradual accretion had extended a riparian owner's land bordering on a navigable river, and at some time an island was formed. Under Ontario law the bed of the river, being navigable, was vested in the Crown. Later accretions joined the island to the mainland and the river flowed on the other side. Haldiman, County Court Judge of Kinnear County, Ontario, held the plaintiff owned the entire accretion including the island. The same sort of reasoning would seem applicable to sand bars on the sea shore. However, in *Re Bulman*,²⁶⁵ a different attitude appears to have been taken by Ruttan J. of the Supreme Court of British Columbia. There sand bars were formed at the junction of a river and a lake from the dropping of material in suspension when the river water was slowed on its entrance to the lake. Bulman's land adjoined the area, but since the sand bars were not connected to his land, the court concluded the land did not belong to him. In the course of his judgment, however, Ruttan J. spoke of accretion as contemplating a process of building up against the land and he doubted whether accretion by alluvium, as opposed to recession, could occur by accretion in a large inert lake such as that in question. This would appear to indicate that if the sand bar had grown until it extended to the defendant's land, it would not be held to be an accretion to that land.

Accretion and Owners of Water Lots

Thus far we have been principally concerned with the rights of riparian owners whose lands extend up to the water. Others who may be affected by accretion are owners of the shore (i.e. the land between high and low water

262. *Attorney-General v. Perry* (1865), 15 U.C.C.P. 329; *Dixson v. Snetsinger* (1873), 23 U.C.C.P. 235; *Dunphy v. Williams* (1874), 15 N.B.R. 350.

263. [1946] S.C.R. 584.

264. [1954] 1 D.L.R. 571.

265. (1966), 57 D.L.R. (2d) 658.

mark), or the bed, or others owning land under water bounded either by the high or low water mark. In all these cases, the boundary is a fluid one which follows the changes wrought by nature as the shore is increased or diminished.²⁶⁶

Fixed Boundaries

Accretion is inapplicable where the boundary is not a water line. Specifically described lands, therefore, continue their former boundaries whether the adjoining water rises or recedes.²⁶⁷ However, it should not be forgotten that lands bounded by non-tidal waters are presumed to extend *ad medium filum*, and waters bounded by the sea are presumed to extend to high water mark, notwithstanding their description by metes and bounds or by a plan.²⁶⁸

A few instances of specifically described lands may be given.²⁶⁹ In *Yukon Gold Co. v. Boyle Concessions Ltd.*,²⁷⁰ Idington J. of the Supreme Court of Canada stated that a grant of mineral under a specifically described parcel of land could not be affected by the erosion of the bank of a river. In *Volcanic Oil and Gas Co. v. Chaplin*,²⁷¹ the waters of a lake encroached gradually on riparian land and finally completely absorbed it and encroached on the adjacent non-riparian lot which had been described in the deed by metes and bounds. It was held that the entire adjacent lot remained the property of its owner notwithstanding that part of it was now covered by water.

Protection Against Erosion

The owner of land on a body of water has a right to have the natural barriers against encroachment on his land maintained. Accordingly he has an action against anyone who removes sand or gravel in front of his property, even when the sand is taken from an area, such as the bed, owned by some other person, if this would result in encroachment on his land.²⁷² The removal need not be intentional. Thus an owner of riparian land was held entitled to damages from a railway company which, in building its line of railway, had without statutory authorization constructed an embankment which had the effect of throwing the water with such force against the riparian owner's land as to wash away the sand and gravel.²⁷³

266. *Esson v. Mayberry* (1841), 1 N.S.R. 185; *Clarke v. City of Edmonton*, [1930] S.C.R. 137; *Wells v. Mitchell*, [1939] O.R. 372; *In re Quieting of Titles Act and Neilson* (1954), 13 W.W.R. (N.S.) 241; reversed on facts: *Attorney-General of British Columbia v. Neilson*, [1956] S.C.R. 819; *Georgian Cottagers Ass'n. v. Tp. of Flos and Kerr*, [1962] O.R. 429.

267. *Volcanic Oil Co. v. Chaplin* (1912), 27 O.L.R. 34, 484; reversed on facts: (1914), 31 O.L.R. 364; *Yukon Gold Co. v. Boyle Concessions Ltd.*, [1919] 3 W.W.R. 144 (S. Ct. Can.); *Re Maile & Toronto*, [1932] O.R. 75; *Municipality of Queen's County v. Cooper*, [1946] S.C.R. 584; *Bruce v. Johnson*, [1954] 1 D.L.R. 571.

268. See pp. 239-47. *Re Maile & Toronto*, [1932] O.R. 75, seems inconsistent with the weight of authority on this point.

269. See also pp. 240, 242-3.

270. [1919] 3 W.W.R. 144.

271. (1912), 27 O.L.R. 34, 484; reversed on facts: (1914), 31 O.L.R. 364.

272. *Stover v. Lavoie* (1906), 8 O.W.R. 398; affirmed: (1907), 9 O.W.R. 117; *Kennedy v. Husband*, [1923] 1 D.L.R. 1069.

273. *Caldwell and Fleming v. Canadian Pacific Ry.* (1916), 37 O.L.R. 412.

The owner of land adjoining water, whether on the sea or on inland streams or lakes, may take steps to protect his property from being washed away or invaded by water.²⁷⁴ In fact, where a stream suddenly alters its course, owing for example to an extraordinary flood, a landowner whose land has been washed away may, until prescriptive rights have been established against him, divert the stream back to its original course; but he may not, of course, divert it otherwise than to its original channel.²⁷⁵

Though a riparian owner is entitled to protect his property from the invasion of the water by building a bulwark, dyke or embankment, he is not at liberty to do so in such a way as to do injury to the property of the riparian owner on the other side.²⁷⁶ Thus in *Lorraine v. Norrie*,²⁷⁷ the plaintiff and defendant lived on opposite sides of a river with low banks. The defendant, to prevent inundation, built a wing dam diagonally into the river which had the effect of directing the water towards the plaintiff's lot, thereby causing damage. The defendant was held liable for the damage. At the same time a riparian owner is entitled to protect his land from floods by building an embankment either on the water's edge or some distance back even though the result may be to injure land on the other side of the river; he must, however, exercise reasonable care and skill not to injure his neighbour and do no more than is necessary to protect himself.²⁷⁸

Problems relating to accretion resulting from dykes have already been discussed.²⁷⁹

Road Allowances

Several problems arise respecting roads and road allowances circling or leading into waters. Such roads, like other property, are subject to the doctrines of accretion and erosion.²⁸⁰ If a municipality or other body is under a duty to repair a road leading to water, it will be liable to repair additions to it by accretion, and conversely when the road has sufficiently eroded as to vest title in the owner of the bed, the municipality will cease to be subject to that duty.²⁸¹ Where a road runs along a body of water any accretion vests in the owner of the road. Accordingly where the Crown owns the road, it vests in the Crown,²⁸² but if the road vests in the adjoining owners subject to any easement in the public to pass and repass, the accretion belongs to the adjoining owners.²⁸³ If a road allowance

274. *Reg. v. Lord* (1864), 1 P.E.I. 245; *County of York v. Rolls* (1900), 27 O.A.R. 72; *Lorraine v. Norrie* (1912), 46 N.S.R. 177; *Gerrard v. Crowe*, [1921] 1 A.C. 395; *Kennedy v. Husband*, [1923] 1 D.L.R. 1069; *Attorney-General of British Columbia v. Neilson*, [1956] S.C.R. 819, *per* Rand J.

275. *County of York v. Rolls* (1900), 27 O.A.R. 72.

276. *McLean v. Crosson* (1873), 33 U.C.Q.B. 448; *Lorraine v. Norrie* (1912), 42 N.S.R. 177; see also *Caldwell and Fleming v. Canadian Pacific Ry* (1916), 37 O.L.R. 412.

277. (1912), 42 N.S.R. 177.

278. *Gerrard v. Crowe*, [1921] 1 A.C. 395.

279. See p. 227.

280. *Cockburn v. Eager* (1876), 24 Gr. 409; *Standly v. Perry* (1879), 3 S.C.R. 356; *McCormick v. Municipal Corp. of Pelée* (1890), 20 O.R. 288; *Massey-Harris v. Elliott* (1902), 1 O.W.R. 65; *Herrimon v. Pulling & Co.* (1906), 8 O.W.R. 149.

281. *Standly v. Perry* (1877), 2 O.A.R. 195; affirmed: (1879), 3 S.C.R. 356.

282. *Cockburn v. Eager* (1876), 24 Gr. 409.

283. *Massey-Harris Co. v. Elliott* (1902), 1 O.W.R. 65.

is said to run along a body of water and there is an accretion, it would depend on an interpretation of the instrument creating the allowance whether it was intended to follow the boundary of the water as it shifted.²⁸⁴

Boundaries of Adjoining Owners

There may at times be considerable difficulty in determining the boundary of lands of two adjacent owners in relation to accreted lands. There are few Canadian cases. In *Paul v. Bates*²⁸⁵ where there had been an accretion to lands on the open sea, it was held that as between adjoining owners the manner of division was to take a line representing the line of the shore drawn at such distance seaward as to clear the sinuosities of the coast and let fall a perpendicular from the end of the land boundary dividing the properties in dispute. By the line of shore was there meant a line fairly representing the average line of the shore extending on either side of the disputed land, not a line drawn along the whole coast of the bay where the land was situate.

Another problem is mentioned in the judgments of Locke and Nolan JJ. in *Attorney-General of British Columbia v. Neilson*.²⁸⁶ Suppose a curving strip of lands begins on one landowner's land, and then curves in front of another's land, what are the rights of these landowners? The judges gave no answer but if the test in *Paul v. Bates* is applied, the first landowner would get that portion of the strip in front of his property. But the portion in front of the second landowner's would continue to belong to the Crown or other owner of the bed; there would be no accretion to the second landowner's property unless it was connected.

284. See *Herrimon v. Pulling & Co.* (1906), 8 O.W.R. 149.

285. (1934), 48 B.C.R. 473.

286. [1956] S.C.R. 819.

CHAPTER TEN

Ownership of the Bed

By Gerard V. La Forest

GENERAL

Riparian rights arise by virtue of the ownership of the bank of a stream, but many of these rights, particularly the enjoyment of the stream for extraordinary purposes, cannot be effectively exercised without owning the bed or having the permission of the owner to use it. A dam is, in many cases, required to make use of the water, but if the bed of the stream belongs to another, a riparian owner cannot build on it without subjecting himself to an action in damages for trespass. And indeed any fixture erected in a stream may become the property of the owner of the bed.¹

The owner of the bed of a stream, lake, or other body of water has, in general, the same rights of property and is entitled to use it in the same manner as any other landowner.² He owns everything forming part of the land such as sand and gravel.³ He also owns everything above or below the land, except game and fish (which must first be appropriated) and water, which at common law does not form the subject of ownership, being a common resource.⁴ Though he does not own game or fish on the land until it is appropriated, he has the exclusive right to hunt, fowl or fish over his land, subject, of course, to game and fisheries laws.⁵

Since the owner of the bed has generally the same rights as other landowners, he may erect anything thereon—a wharf,⁶ a dam,⁷ a bridge,⁸ piers and booms,⁹ or

1. *Quiddy River Boom Co. v. Davidson* (1886), 25 N.B.R. 580.

2. *Caldwell v. McLaren* (1884), 9 A.C. 392; *Wade v. Nashwaak Pulp & Paper Co.* (1918), 46 N.B.R. 11; *Upper Ottawa Improvement Co. v. Hydro-Electric Power Commission of Ontario*, [1961] S.C.R. 486.

3. *Edmonton Concrete v. Cristall* (1909), 2 Alta. L.R. 409; *Toronto Harbour Commissioners v. Royal Canadian Yacht Club* (1913), 29 O.L.R. 321; *Reid v. Standard Construction Co.* (1917), 51 N.S.R. 33; *Turnbull v. Saunders* (1921), 48 N.B.R. 502.

4. See, *inter alia*, *McKie v. The K.V.P. Co. Ltd.*, [1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4 D.L.R. 497 (S.Ct.Can.). See also pp. 223-4.

5. *Beatty v. Davis* (1891), 20 O.R. 373; *Barber v. Andrews* (1921), 20 O.W.N. 239; *Re Iverson and Greater Winnipeg Water District* (1921), 57 D.L.R. 184; *Rice Lake Fur Co. v. McAllister*, [1925] 2 D.L.R. 506; *Gordon v. Hall and Hall* (1959), 16 D.L.R. (2d) 379. The private right of fishing is discussed at pp. 235-7.

6. See pp. 237-9.

7. See, *inter alia*, *McLaren v. Cook* (1847), 3 U.C.Q.B. 299; *McLaren v. Buck* (1876), 26 U.C.C.P. 539; *Re Burnham* (1895), 22 O.A.R. 40; *Roy v. Fraser* (1903), 36 N.B.R. 113; *Crosby v. Yarmouth Street Ry.* (1911), 45 N.S.R. 330.

8. *R. v. Bell Lumber Co.*, [1932] Ex. C.R. 31.

9. *Wade v. Nashwaak Pulp & Paper Co.* (1918), 46 N.B.R. 11.

other structures.¹⁰ It follows, of course, that landowners on opposite sides of the river, who have title *ad medium filum aquae*, may agree together to build a dam.¹¹

But the right of the owner of the bed of water to build on his land is subject to the public rights of navigation, floating and fishing and to the rights of other landowners on and along the stream or lake.¹² The mere fact, however, that a person is lawfully on waters exercising a public right, for example, navigation, does not permit him to exercise rights vested in the owner of the bed, such as shooting or fowling.¹³

The owner of the land through which a stream flows has the right to the water power of his land, i.e. the difference in height between the surface where the stream enters his land and where it leaves it.¹⁴

The owner of the bed also has a right to cut ice on the river over his land,¹⁵ and to prohibit others from walking on the ice.¹⁶ This, of course, applies where the Crown is the owner of the bed; but, at least where the water is navigable, if the Crown makes no claim to the ice it becomes the property of anyone who gathers it up and reduces it to possession.¹⁷ However, a person who exercises this right must exercise reasonable care, by fencing or otherwise, so that other persons are not injured by falling through the opening made in the ice.¹⁸

PRIVATE RIGHT OF FISHING

In addition to the ordinary rights of other landowners, the grant of the bed of a lake or stream ordinarily carries with it the exclusive right to fish in the waters flowing over it unless the lake or stream is tidal at that point.¹⁹ In tidal streams the public has a right to fish no matter who owns the soil.²⁰ Some judges have even gone further and asserted that the public has a right to fish in navigable

10. *Jardine v. Simon* (1876), N.B. Eq. Cas. (Tru.) 1.

11. *Miner v. Gilmour* (1858), 12 Moo. P.C. 131; 14 E.R. 861; *Crosby v. Yarmouth Street Ry Co.* (1911), 45 N.S.R. 330.

12. *McArthur v. Gillies* (1881), 29 Gr. 223; *Reg. v. Robertson* (1882), 6 S.C.R. 52; *Caldwell v. McLaren* (1884), 9 A.C. 392; *Beatty v. Davis* (1891), 20 O.R. 373; *Roy v. Fraser* (1903), 36 N.B.R. 113; *Wade v. Nashwaak Pulp & Paper Co.* (1918), 46 N.B.R. 11.

13. *R. v. Harron* (1912), 21 O.W.R. 951; *Rice Lake Fur Co. v. McAllister*, [1925] 2 D.L.R. 506; *Gordon v. Hall and Hall* (1959), 16 D.L.R. (2d) 379.

14. *Dickson v. Burnham* (1868), 14 Gr. 594; varied: (1870), 17 Gr. 261; *Re Burnham* (1895), 22 O.A.R. 40; *Ahern v. Booth* (1903), 2 O.W.R. 696; affirmed: (1904), 3 O.W.R. 852.

15. *Re Iverson and Greater Winnipeg Water District* (1921), 57 D.L.R. 184; *Lake Simcoe Ice and Coal Storage Co. v. McDonald* (1900), 31 S.C.R. 130.

16. See *Dinn v. Reg.* (1874), 1 P.E.I. 361; *Twin City Ice Co. v. City of Ottawa* (1915), 34 O.L.R. 358.

17. *Lake Simcoe Ice and Coal Storage Co. v. McDonald* (1900), 31 S.C.R. 130; *Castaldi v. Denison* (1920), 47 O.L.R. 237.

18. *Castaldi v. Denison* (1920), 47 O.L.R. 237.

19. *Robertson v. Steadman* (1876), 16 N.B.R. 621 (cf. *Steadman v. Robertson* (1879), 18 N.B.R. 580); *Phair v. Venning* (1882), 22 N.B.R. 362; *Reg. v. Robertson* (1882), 6 S.C.R. 52; *Venning v. Steadman* (1884), 9 S.C.R. 206; *Nash v. Newton* (1891), 30 N.B.R. 610; *Beatty v. Davis* (1891), 20 O.R. 373; *R. v. Harron* (1912), 21 O.W.R. 951; *Keewatin Power Co. v. Town of Kenora* (1908), 16 O.L.R. 184; *Re Iverson and Greater Winnipeg Water District* (1921), 57 D.L.R. 184; *McDonald v. Linton* (1926), 53 N.B.R. 107; *McKie v. The K.V.P. Co. Ltd.*, [1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4 D.L.R. 497 (S.Ct.Can.); *Boyd v. Fudge* (1965), 46 D.L.R. (2d) 679.

20. See pp. 195-9.

waters, whether tidal or not, at least where the bed remains in the Crown.²¹ But it can be stated with some confidence that that is not the case.²² In that situation, the right to fish is in the Crown which may, subject to statute, act in relation to its fisheries in the same way as any other landowner.²³ Ownership of fisheries by the Crown is usually in the Crown in right of the province. The province has power to legislate respecting such fisheries as lands belonging to the province.²⁴ Like other landowners, it must comply with federal laws respecting fisheries. There is no question that the owner of the bed has the exclusive right to fish in floatable rivers.²⁵

Though the right of fishing is usually enjoyed as an incident to the bed, it may of course be transferred to others by lease or licence. Moreover it can be granted, or reserved from a grant, and exist as a separate property right severed from the ownership of the soil. Such a right is called a *profit a prendre* and may be transferred by deed or will like other property interests.²⁶ This right may be vested in one person, when it is called an exclusive or several fishery, or in two or more persons, when it is referred to as a common of piscary or common fishery.²⁷

An owner of a fishery has a right of action against anyone who pollutes the stream. Proof of damage is not necessary, for further pollution by others could result in damage. This being an injury to a property right an injunction will be granted as of course to restrain the pollution; damages would not be an adequate remedy.²⁸ This varies sharply from an action for interference with the public right of fishing where it is necessary to establish a public nuisance from which the plaintiff suffers special damage in addition to that of the public generally; otherwise the remedies are an action by the Attorney General or an indictment.²⁹ And the courts have frequently stated that they will not give any consideration to the fact that the activity causing the pollution is of great economic value to the community, such as a kraft mill or an iron mine. The courts will, however, postpone the operation of an injunction for a limited period, say several months, to give the defendant time to alter his plant to prevent pollution.³⁰

21. *Robertson v. Steadman* (1876), 16 N.B.R. 621 (but Fisher J. dissented and his approach was later accepted in *Steadman v. Robertson* (1879), 18 N.B.R. 580); *Reg. v. Robertson* (1882), 6 S.C.R. 52, per Strong J.; *Moffatt v. Roddy* (1839), 4 Ont. Cas. Law Dig. 7323; Can. Abridg., vol. 20, col. 375; *Re Provincial Fisheries* (1895), 26 S.C.R. 444, per Strong C.J.; *McDonald v. Linton* (1926), 53 N.B.R. 107, per Barry C.J.; the point is inconclusively discussed in *The Tadénac Club Ltd. v. Heber and Spitzer*, [1957] O.R. 272.

22. *Reg. v. Robertson* (1882), 6 S.C.R. 52, per Ritchie C.J.; *Beatty v. Davis* (1891), 20 O.R. 373; *Attorney-General of British Columbia v. Attorney-General of Canada*, [1914] A.C. 153.

23. See *Reg. v. Robertson* (1882), 6 S.C.R. 52.

24. For legislative power respecting fisheries, see pp. 38-42.

25. *Reg. v. Robertson* (1882), 6 S.C.R. 52; *Boyd v. Fudge* (1965), 46 D.L.R. (2d) 679.

26. *Reg. v. Robertson* (1882), 6 S.C.R. 52; *Keewatin Power Co. v. Town of Kenora* (1908), 16 O.L.R. 184; *Attorney-General of British Columbia v. Attorney-General of Canada*, [1914] A.C. 153; see also *Duchaine v. Matamajow Salmon Club* (1919), 58 S.C.R. 222.

27. *Keewatin Power Co. v. Town of Kenora* (1908), 16 O.L.R. 184.

28. *Nepisiquit Real Estate and Fishing Co. v. Canadian Iron Corp. Ltd.* (1913), 42 N.B.R. 387; *McKie v. The K.V.P. Co. Ltd.* [1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4 D.L.R. 497 (S.Ct.Can.).

29. *Filion v. New Brunswick International Paper Co.* (1934), 8 M.P.R. 89.

30. *Nepisiquit Real Estate and Fishing Co. v. Canadian Iron Corp.* (1913), 42 N.B.R. 387; *McKie v. The K.V.P. Co. Ltd.* [1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4 D.L.R. 497 (S.Ct.Can.).

A person who owns a fishery must himself exercise his rights reasonably. Though he may, subject to the fishing laws, catch as many fish as he can, he must not in exercising his rights do anything to injure the rights of persons above or below him.³¹

WHARVES

Wharves are obviously necessary for the loading and unloading of vessels and the law must make accommodations to permit their erection and maintenance. However, the conditions under which a wharf may be erected or maintained are subject to the public right of navigation on the one hand and to private rights of property on the other.

The public has a right of unlimited navigation over navigable waters and, accordingly, if a wharf interferes with navigation, an indictment or an action by the Attorney-General may be brought against its owner for a public nuisance, and where a person has suffered special damages, he may bring an action or abate the nuisance even where the wharf is built on the wharf owner's land. Thus, in *Wood v. Esson*,³² the plaintiff who owned a wharf in Halifax harbour put in piles to extend the wharf in such a way as to interfere with the defendant's ability to dock at his wharf, which was next to the plaintiff's. To avoid this difficulty, the defendant removed the piles, and the plaintiff brought action for trespass. The action failed, however, the Supreme Court of Canada holding that the piles constituted an obstruction to navigation causing special damages to the defendant. Instead of abating it, a person whose navigation is obstructed may use the wharf as a means of making the highway available, as where his access to land where he has a right to go is being blocked.³³

But a wharf does not constitute an obstruction to navigable waters by reason only that it is erected in navigable waters. It must actually obstruct navigation, and whether it does so or not is a question of fact.³⁴ In truth, a wharf will often be of benefit to navigation rather than a detriment. In such a case, even if it does constitute an interference with navigation, if the benefits to the public from the wharf are greater than the detriment from the interference, the wharf will not be characterized as a public nuisance.³⁵

Though at one time it would appear that permission under the Navigable Waters Protection Act was not required to build a wharf in navigable waters, the present Act specifically refers to wharves.³⁶ But even if permission is not obtained, and even if the wharf constitutes a nuisance, the owner still has rights to it as an occupier and can maintain an action for trespass or interference with his right of access thereto.³⁷

31. *McKie v. The K.V.P. Co. Ltd.* [1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4 D.L.R. 497 (S.Ct.Can.).

32. (1883), 9 S.C.R. 239; see also *Clendinning v. Turner* (1885), 9 O.R. 34.

33. *Clendinning v. Turner* (1885), 9 O.R. 34.

34. *Reg. v. Port Perry and Port Whitby Ry.* (1876), 38 U.C.Q.B. 431; *McNeil v. Jones* (1894), 26 N.S.R. 299; *Huntley v. Jeffers* (1906), 1 E.L.R. 385.

35. *Attorney-General of Canada v. Attorney-General of Ontario*, [1898] A.C. 700.

36. R.S.C., 1970, c. N-19, s. 3; *Huntley v. Jeffers* (1906), 1 E.L.R. 385 holds permission is not required, but *London v. City of Vancouver* (1934), 49 B.C.R. 328, is the other way.

37. *London v. City of Vancouver* (1934), 49 B.C.R. 328; *Eagles v. Merritt* (1853), 7 N.B.R. 550.

Sometimes a wharf by itself does not constitute a nuisance, but ships lying at the wharf will cause difficulty for other persons passing in ships or docking at other wharves. In such circumstances the ship lying at the wharf and those passing or docking at other wharves are all exercising the public right of navigation. As already seen anyone who exercises that right must do so reasonably with due regard to the similar rights of others, and the question of reasonableness is one, of course, that depends on all the circumstances of the case.³⁸

The public right of navigation apart, a person may, of course, build a wharf on his land whether on the shore or on a water lot. Moreover, a riparian owner may construct and moor to his bank a floating wharf, and bring an action in respect of it for any unauthorized interference with the flow and purity of water. Thus in *Booth v. Ratte*,³⁹ the plaintiff who had erected such a wharf on the Ottawa River succeeded in an action against the defendant, an upstream sawmill owner, who allowed sawdust, blocks, barks and other refuse to fall into the river and accumulate in floating masses substantial enough occasionally for a man to walk on and offensive to taste and smell.

A more difficult question is the right of a person to build on the shore of tidal waters, that is between high and low water mark. In the absence of express grant this area belongs to the Crown, and not to the adjacent landowner.⁴⁰ The landowner may not, therefore, as of right construct a wharf thereon,⁴¹ and the same is true of Crown lands covered with water.⁴² The Crown may, of course, permit the construction of wharves thereon by licence or grant,⁴³ but wharves built on the shore without such permission may at any time be abated by the Crown, though the Crown will not usually do so except when required for the public good.⁴⁴ A person who occupies such a wharf for the period of prescription may acquire the right to maintain it both against the Crown and private individuals.⁴⁵ His rights thereto are the same as to any other private property. Thus he can replace the wharf with a new one,⁴⁶ though he must not extend it so as to interfere with another person's access to his land or with the public right of navigation.⁴⁷ A member of the public is not entitled to complain about a wharf built on Crown lands unless it interferes with his property rights, such as his right of access to his land, or it is such an inconvenience to the public as to constitute a public nuisance, and then it must be remembered that the inter-

38. See *Eagles v. Merritt* (1853), 7 N.B.R. 550; *Hamilton Steamboat Co. v. MacKay* (1907), 10 W.W.R. 295; *Zwicker v. La Have Steamship Co.* (1911), 9 E.L.R. 104.

39. (1889), 15 A.C. 188.

40. See, *inter alia*, *Eagles v. Merritt* (1853), 7 N.B.R. 550; *Reg. v. Taylor* (1862), 10 N.B.R. 242; *Reg. v. Lord* (1864), 1 P.E.I. 245.

41. *Ibid.*; see also *Quiddy River Boom Co. v. Davidson* (1886), 25 N.B.R. 580.

42. *Quiddy River Boom Co. v. Davidson* (1886), 25 N.B.R. 580; *R. v. Hudson's Bay Co.* (1916), 17 Ex. C.R. 441; *London v. City of Vancouver* (1934), 49 B.C.R. 328.

43. See *Eagles v. Merritt* (1853), 7 N.B.R. 550; *Reg. v. Lord* (1864), 1 P.E.I. 245.

44. *Reg. v. Lord* (1864), 1 P.E.I. 245.

45. *O'Dwyer v. Tessier* (1859), 4 Nfld. L.R. 278; *Tessier v. O'Dwyer* (1859), 4 Nfld. L.R. 284; *Eagan v. Barron* (1859), 4 Nfld. L.R. 416; *Eagan v. Barron and Fraser* (1859), 4 Nfld. L.R. 419; *Martin v. Woods* (1905), 9 Nfld. L.R. 66. For a further discussion of the acquisition of prescriptive rights, see pp. 215-7.

46. *Martin v. Woods* (1905), 9 Nfld. L.R. 66.

47. *O'Dwyer v. Tessier* (1859), 4 Nfld. L.R. 278; *Tessier v. O'Dwyer* (1859), 4 Nfld. L.R. 284.

ference will not be characterized as a public nuisance if the benefit to the public from the wharf exceeds the inconvenience.⁴⁸

Finally it may be mentioned that in *Lee v. The Olympian*⁴⁹ it was held that whoever interferes with the free use of a public landing or wharf erected on land acquired for that purpose only by a municipality empowered by statute to do so is a wrongdoer, and the municipality has no power to licence such interference.

PRIMA FACIE RULES RESPECTING OWNERSHIP OF BED

Introduction

Frequently in a grant of land on or adjoining which there is a stream or body of water, no specific mention is made of the water or its bed. In the absence of statute, the water is not the subject of ownership,⁵⁰ but the bed may be owned. A number of *prima facie* rules have been devised to determine whether the bed is included in the grant. These rules apply to all instruments transferring land, whether Crown grants⁵¹ or ordinary conveyances.⁵² They are, however, mere rules of construction and may be overridden by the contrary intention of the grantor appearing in the instrument or from the surrounding circumstances.⁵³

Tidal Waters

High Water Mark Rule

The rule to be applied depends on the nature of the body of water. If it is tidal, whether it be the sea⁵⁴ or a tidal river, lake or stream⁵⁵ a grant of land adjoining the water *prima facie* extends only to ordinary high water mark. For example, in *Cheney v. Guptill*⁵⁶ a grant of Cheney's Island *simpliciter* was held to convey the island down to high water mark. The question whether waters are affected by the ebb and flow of the tide is, of course, a question of fact. Occasionally the question may give rise to interesting problems. For example, in *Nash v. Newton*⁵⁷ there was a slight rise and fall of water in a lake caused by percolation of sea water through a sea wall. The lake was not considered tidal until the sea wall was opened.

48. *Ibid.*

49. (1892), 2 B.C.R. 84.

50. *Meisner v. Fanning* (1842), 3 N.S.R. 97; *Reg. v. Meyers* (1853), 3 U.C.C.P. 305; *Hamilton v. Gould* (1864), 24 U.C.Q.B. 58; *Whelan v. McLachlan* (1865), 16 U.C.C.P. 102; *Keith v. Corry* (1877), 17 N.B.R. 400.

51. See, *inter alia*, *Keewatin Power Co. v. Town of Kenora* (1908), 16 O.L.R. 184; *Williams v. Pickard* (1908), 17 O.L.R. 547.

52. See, for example, *Lee v. Arthurs* (1918), 46 N.B.R. 482.

53. See, *inter alia*, *Maclaren v. Attorney-General of Quebec*, [1914] A.C. 258; *Fares v. R.*, [1932] S.C.R. 78.

54. *Doe d. Fry v. Hill* (1853), 7 N.B.R. 587; *Reg. v. Cox* (1858), 1 P.E.I. 170; *Bown v. Kavanagh* (1859), 1 Nfld. L.R. 413; *Reg. v. Lord* (1864), 1 P.E.I. 245; *Cheney v. Guptill* (1871), 13 N.B.R. 378; *Wilson v. Codyre* (1888), 27 N.B.R. 320; *Esquimalt & Nanaimo Ry. v. Treat*, [1919] 3 W.W.R. 356 (P.C.); *Fares v. R.*, [1932] S.C.R. 78; *Young v. McIsaac* (1897), 8 E.L.R. 245.

55. *Rorison v. Kolosoff* (1910), 15 W.L.R. 497; *Lee v. Arthurs* (1919), 46 N.B.R. 482; *Lee v. Logan* (1919), 46 N.B.R. 502; *Turnbull v. Saunders* (1921), 48 N.B.R. 502; *Municipality of Queen's County v. Cooper*, [1946] S.C.R. 584.

56. (1869), 13 N.B.R. 378.

57. (1891), 30 N.B.R. 610.

By ordinary high water mark is meant the medium high water mark at ordinary or neap tides.⁵⁸ To add precision it may be well to note that the law takes cognizance of three types of tides: (1) high spring tide, which happens at the two equinoxes; (2) spring tide, which happens at the full moon and the change of the moon; (3) the neap or ordinary tide, which takes place between full moon and change of moon twice every twenty-four hours. The first two are excluded in computing medium high water mark, which refers to ordinary or neap tide. The ordinary or neap tide, of course, varies from day to day. For about three days in the week, the tide is higher than the medium, and for about three days, it is lower; for one day medium tide is reached. It is this medium tide that has been adopted as the ordinary or mean high water mark. In *Nielson v. Pacific Great Eastern Ry.*⁵⁹ Macdonald J. of the Supreme Court of British Columbia stated that such limit can only be determined by observation extending over at least a year, and there being no such records in British Columbia when that case was decided, he relied on the state of vegetation and accumulation of debris and driftwood. But under ordinary circumstances, it seems doubtful that the state of vegetation will be used as a guide; in *Turnbull v. Saunders*⁶⁰ in the Supreme Court of New Brunswick it was stated that vegetation has nothing to do with locating high water mark. As one would expect, in the case of a river, the term "ordinary high water mark" refers to the high water mark during its more usual level of flow, not high water mark at freshet time.⁶¹

Exceptions

Though the rule generally applies, the description or the circumstances may lead the courts to a different construction. Ordinarily, monuments on the shore referred to in the description will be looked on as marking the line to, rather than along the shore,⁶² but the description or monuments may show an intention that fixed boundaries shall govern, not the fluctuating line of the shore. This was held to be the case in *Delap v. Hayden*⁶³ where the location of other lots, and the fact that the high tides of the Bay of Fundy at that point were such that a fluvial boundary would be difficult to ascertain, seemed to point to an intention to have a fixed boundary.

Ownership of Shore

From the rule that land adjoining tidal water ordinarily extends to high water mark, it follows that the shore of tidal waters, i.e. the space between high

58. *Doe d. Fry v. Hill* (1853), 7 N.B.R. 587; *Wilson v. Codyre* (1888), 27 N.B.R. 320; *Young v. McIsaac* (1897), 8 E.L.R. 245; *McDonald v. Sherren* (1914), 14 E.L.R. 252; *Nelson v. Pacific Great Eastern Ry.*, [1918] 1 W.W.R. 597; *Turnbull v. Saunders* (1921), 48 N.B.R. 502; *Delap v. Hayden* (1924), 57 N.S.R. 346.

59. [1918] 1 W.W.R. 597.

60. (1921), 48 N.B.R. 502.

61. *Lee v. Arthurs* (1919), 46 N.B.R. 482; *Lee v. Logan* (1919), 46 N.B.R. 502; *Turnbull v. Saunders* (1921), 48 N.B.R. 502.

62. See, *inter alia*, *Burke v. Niles* (1870), 13 N.B.R. 166.

63. (1924), 57 N.S.R. 346; see also *Roche v. Roche* (1851), 3 Nfld. L.R. 188.

and low water mark,⁶⁴ belongs to the Crown⁶⁵—in the Crown in right of the Dominion in a public harbour⁶⁶, and in other cases in right of the province.⁶⁷ So too the bed remains in the Crown. This means the Crown in right of the province in the case of rivers and other inland waters.⁶⁸ The competing claims of the federal and provincial governments relating to the sea bed are discussed in detail elsewhere.⁶⁹

The Crown may, however, expressly convey land to low water mark⁷⁰ and, for that matter, the bed as well. In fact, even without express words, such a conveyance may properly be implied from the terms of a conveyance. For example, a grant of a piece of land through which a tidal river flows will often raise the implication that the shore and bed are included in the grant. However, this is not always so. In *Lock v. Cleveland*,⁷¹ such a conveyance took place, but the description, though describing the land as crossing the river, spoke of it as being bounded by its shore. It is all a question of construction of the instrument having regard to its terms and to the circumstances under which it was made.

Grants to Low Water Mark

When a grant is expressed to extend to low water mark, it *prima facie* refers to the ordinary low water mark corresponding to ordinary high water mark as above described.⁷² For example, in *Doe d. Fry v. Hill*⁷³ a grant of an island “with all contiguous small islands joined to or connected with the said island by a beach or shoal dry at low water” was held not to include islands connected with the principal island by a shoal that is only dry at extraordinary high tides.

Non-Tidal Waters

The *Ad Medium Filum Aquae* Rule

Canadian courts have followed the English rule that the owner of land through which a non-tidal stream flows owns the bed of the stream⁷⁴ unless it has been expressly or impliedly reserved; and if the stream forms the boundary between lands owned by different persons, each proprietor owns the bed of the

64. *Lock v. Cleveland* (1849), 6 N.B.R. 390; *Parker v. Elliott* (1852), 1 U.C.C.P. 470; *Young v. McIsaac* (1897), 8 E.L.R. 245; *Mowat v. North Vancouver* (1902), 9 B.C.R. 205 (in this case the expression “coast” was interpreted as including islands along the coast in contrast to “shore”); *Kennedy v. Husband*, [1923] 1 D.L.R. 1069.

65. *Reg. v. Taylor* (1862), 10 N.B.R. 242; *Reg. v. Lord* (1864), 1 P.E.I. 245; *Byron v. Stimpson* (1878), 16 N.B.R. 697; *Wilson v. Codyre* (1888), 27 N.B.R. 320; *Young v. McIsaac* (1897), 8 E.L.R. 245; *Keewatin Power Co. v. Town of Kenora* (1908), 16 O.L.R. 184; *Fares v. R.*, [1932] S.C.R. 78.

66. See pp. 23-7.

67. See, *inter alia*, *Re Provincial Fisheries* (1895), 26 S.C.R. 444; affirmed: *Attorney-General of Canada v. Attorney-General of Ontario*, [1898] A.C. 700; see pp. 68-9.

68. *Attorney-General of Canada v. Attorney-General of Ontario*, [1898] A.C. 700.

69. See pp. 463-8.

70. See *Doe d. Fry v. Hill* (1853), 7 N.B.R. 587; *Reg. v. Lord* (1864), 1 P.E.I. 245; *Brown v. Reed* (1874), 15 N.B.R. 206; *Jardine v. Simon* (1876), N.B. Eq. Cas. (Tru.) 1; *Wilson v. Codyre* (1888), 27 N.B.R. 320; *City of St. John v. Wilson* (1907), 2 N.B. Eq. 398.

71. (1849), 6 N.B.R. 390.

72. *Doe d. Fry v. Hill* (1853), 7 N.B.R. 587; *Delap v. Hayden* (1924), 57 N.S.R. 346.

73. (1853), 7 N.B.R. 587.

74. *Roy v. Fraser* (1903), 36 N.B.R. 113; *Watson v. Patterson* (1903), 2 N.B. Eq. 488.

river *ad medium filum aquae*—to the centre thread of the stream.⁷⁵ The rule is simply one of interpretation founded on common sense and convenience. It is inconceivable that under ordinary circumstances a person owning land to the middle of a stream would, when selling it, intend to reserve the strip under the water.⁷⁶ The presumption applies with even more force to municipalities where they are divided or bounded by a river.⁷⁷

The expression *ad medium filum aquae* was recently defined with more particularity by the Supreme Court of New Brunswick in *Boyd v. Fudge*⁷⁸ as a line running down the middle of the bed of the river, the bed being that portion of the soil of the river that is always covered with water and that part which is alternately covered or left bare as there may be an increase or diminution of the water, and which is adequate to contain the water at its average or mean stage during the entire year, without reference to the extraordinary freshets of the winter or springs or the extreme droughts of summer or autumn.⁷⁹

The presumption that land touching on a stream extends to the centre of the stream is a strong one.⁸⁰ It will apply where land is described as following the edge, shore or margin of the stream,⁸¹ as being bounded by the several courses or sinuosities of the river,⁸² or as being bounded by the bank.⁸³ It will apply in the latter case even where there is a distinct high bank some distance from the bed of the river⁸⁴ unless there is some strong indication that the high bank is referred to as, for example, where the property was described as running along “the top of the bank”.⁸⁵ “Bank”, therefore, seems to mean the elevations that confine the waters when they rise out of the bed, the bed being the soil usually covered by water.⁸⁶ Similarly, a plan showing the lot as being bounded by the

75. *Robinson v. Murray* (1851), 3 Nfld. L.R. 184; *Burke v. Niles* (1870), 13 N.B.R. 166; *In re McDonough* (1871), 30 U.C.Q.B. 288; *Kains v. Turville* (1871), 32 U.C.Q.B. 17; *Jardine v. Simon* (1876), N.B. Eq. Cas. (Tru.) 1; *Elliott v. Baird* (1879), 26 Gr. 549; *Reb. v. Robertson* (1882), 6 S.C.R. 52; *Saunders v. William Richards Co.* (1901), 2 N.B. Eq. 303; *Massawippi Valley Ry. v. Reed* (1903), 33 S.C.R. 457; *Wason v. Douglas* (1904), 3 O.W.R. 456; *Attorney-General of Quebec and Hull v. Scott* (1904), 34 S.C.R. 603; *West Kootenay Power and Light Co. v. Nelson* (1906), 12 B.C.R. 34; *Keewatin Power Co. v. Town of Kenora* (1908), 16 O.L.R. 184; *Haggerty v. Latreille* (1913), 14 D.L.R. 532; *Maclaren v. Attorney-General of Quebec*, [1914] A.C. 258; *Letarte v. Turgeon* (1915), 26 D.L.R. 25; *Fares v. R.*, [1932] S.C.R. 78; *Derro v. Dubé and Boulet*, [1948] O.R. 52; *Stackhouse v. Morin*, [1948] O.R. 864; *Garvey v. Town of Meaford*, [1949] O.R. 341; *Boyd v. Fudge* (1965), 46 D.L.R. (2d) 679.

76. See *Jardine v. Simon* (1876), N.B. Eq. Cas. (Tru.) 1; *Keewatin Power Co. v. Town of Kenora* (1908), 16 O.L.R. 184.

77. *In re McDonough* (1871), 30 U.C.Q.B. 288.

78. (1965), 46 D.L.R. (2d) 679.

79. See also *Coleman v. Robertson* (1880), 30 U.C.C.P. 609; *Lee v. Arthurs* (1919), 46 N.B.R. 482; *Lee v. Logan* (1919), 46 N.B.R. 502; *Turnbull v. Saunders* (1921), 48 N.B.R. 502; *Clarke v. City of Edmonton*, [1930] S.C.R. 137.

80. *Massawippi Valley Ry. v. Reed* (1903), 33 S.C.R. 457; *Derro v. Dubé and Boulet*, [1948] O.R. 52.

81. *Kains v. Turville* (1871), 32 U.C.Q.B. 17; *Jardine v. Simon* (1876), N.B. Eq. Cas. (Tru.) 1; *Derro v. Dubé and Boulet*, [1948] O.R. 52; *Boyd v. Fudge* (1965), 46 D.L.R. (2d) 679.

82. *Maclaren v. Attorney-General of Quebec*, [1914] A.C. 258; *Derro v. Dubé and Boulet*, [1948] O.R. 52.

83. *Maclaren v. Attorney-General of Quebec*, [1914] A.C. 258.

84. *Stanton v. Windeat* (1890), 1 U.C.Q.B. 30; *Williams v. Pickard* (1908), 17 O.L.R. 547. For a time, however, the contrary view was advanced: *McArthurs v. Gillies* (1881), 29 Gr. 223.

85. *Harrison v. Frost* (1873), 34 U.C.Q.B. 110; *Robertson v. Watson* (1877), 27 U.C.C.P. 579.

86. *Clarke v. City of Edmonton*, [1930] S.C.R. 137; *Boyd v. Fudge* (1965), 46 D.L.R. (2d) 679; see also *Coleman v. Robertson* (1880), 30 U.C.C.P. 609; *Williams v. Pickard* (1908), 17 O.L.R. 547; *Carroll v. Empire Limestone Co.* (1919), 45 O.L.R. 121.

river will not rebut the presumption.⁸⁷ Nor will a reference to a natural object or artificial monument on the shore; such object or monument will be interpreted as marking the line to, rather than along, the river.⁸⁸ The presumption also applies although the description is by metes and bounds and there is an estimation of the quantity of land conveyed not including the land under water.⁸⁹

The presumption that lands adjoining a stream extend *ad medium filum aquae* may, however, be rebutted either by the terms of the instrument,⁹⁰ or circumstances surrounding the grant or conveyance indicating a different intention.⁹¹ The presumption was held rebutted by the words of the instrument, for example, in *Coleman v. Robertson*⁹² when land was described as running along "the verge of the river at low water mark," and there are *dicta* in the case that the presumption would also have been rebutted if the boundary was expressed to run at high water mark. An example of the exclusion of the rule by inconsistent circumstances may be found in *Fares v. R.*⁹³ in the Supreme Court of Canada. There Duff and Rinfret JJ. thought the presumption was excluded from a grant in the Northwest Territories because they read a contrary intention in the Dominion Lands Act under which the grant was made; Lamont and Cannon JJ. thought the rule was excluded because the grantee had paid so much per acre and the only acreage computed for this purpose was dry land.

The existence of an island in the river may give rise to difficulty. Coulson and Forbes⁹⁴ believe that the *medium filum* line should continue and bisect the island. However, in common with American authorities,⁹⁵ the Ontario Court of Appeal in *Wason v. Douglas*⁹⁶ held that the middle thread was to be drawn in the main channel of the river; which channel is the main one is, of course, a question of fact.

Navigable and Floatable Rivers

There is no question that the presumption applies to floatable rivers as well as to smaller streams.⁹⁷ In some provinces, however, it has been held not to apply to navigable rivers, even though non-tidal. This was the generally accepted position

87. *Maclaren v. Attorney-General of Quebec*, [1914] A.C. 258; *Fares v. R.*, [1932] S.C.R. 78; *Derro v. Dubé and Boulet*, [1948] O.R. 42; cf., *Jardine v. Simon* (1876), N.B. Eq. Cas. (Tru.) 1.

88. *Burke v. Niles* (1870), 13 N.B.R. 166; *Maclaren v. Attorney-General of Quebec*, [1914] A.C. 258; *Derro v. Dubé and Boulet*, [1948] O.R. 42.

89. *Maclaren v. Attorney-General of Quebec*, [1914] A.C. 258; *Fares v. R.*, [1932] S.C.R. 78.

90. *Kains v. Turville* (1871), 32 U.C.Q.B. 17; *Saunders v. William Richards Co.* (1901), 2 N.B. Eq. 303; *Massawippi Valley Ry. Co. v. Reed* (1903), 33 S.C.R. 457; *Williams v. Pickard* (1908), 17 O.L.R. 547; *Fares v. R.*, [1932] S.C.R. 78; *Derro v. Dubé and Boulet*, [1948] O.R. 42.

91. *Jardine v. Simon* (1876), N.B. Eq. Cas. (Tru.) 1; *Saunders v. William Richards Co.* (1901), 2 N.B. Eq. 303; *Massawippi Valley Ry. Co. v. Reed* (1903), 33 S.C.R. 457; *West Kootenay Power and Light Co. v. Nelson* (1906), 12 B.C.R. 34; *Attorney-General of Quebec v. McManamy* (1907), 3 E.L.R. 179; *Williams v. Pickard* (1908), 17 O.L.R. 547; *Fares v. R.*, [1932] S.C.R. 78; *Derro v. Dubé and Boulet*, [1948] O.R. 42.

92. (1880), 30 U.C.C.P. 609.

93. [1932] S.C.R. 78.

94. Coulson and Forbes on *Waters and Land Drainage*, 6th ed. (London, 1952), p. 117.

95. See *ibid.*

96. (1904), 3 O.W.R. 456; see also *Keewatin Power Co. v. Town of Kenora* (1908), 16 O.L.R. 184.

97. *Reg. v. Robertson* (1882), 6 S.C.R. 52; *Wason v. Patterson* (1903), 2 N.B. Eq. 488; *Attorney-General of Quebec v. McManamy* (1907), 3 E.L.R. 179; *Maclaren v. Attorney-General of Quebec*, [1914] A.C. 258; *Boyd v. Fudge* (1965), 46 D.L.R. (2d) 679.

in Ontario until 1908,⁹⁸ but in that year the Ontario Court of Appeal in *Keewatin Power Co. v. Kenora*⁹⁹ held that the presumption applied to navigable rivers, but even after this case Anglin J. in the Supreme Court of Canada stated that he was still convinced the earlier view was right.¹⁰⁰ The question was finally settled in that province by the Beds of Navigable Water Act,¹⁰¹ which displaced the presumption. In Manitoba¹⁰² and Alberta¹⁰³ the courts have thus far followed the principle existing in Ontario before the *Kenora* case.

The *Kenora* case did admit that the rule would not usually apply to large bodies like the St. Lawrence River and the Great Lakes, with which most of the earlier cases were concerned. It would be unthinkable that a grant of a small piece of land adjoining such waters would carry several miles of water as an appendage. However, a grant of a very substantial tract might be treated as doing so; it is, after all, merely a matter of construction based on the intention of the parties. In any event, it seems clear that any non-tidal river would be considered subject to the rule in New Brunswick.¹⁰⁴ There is no instance in any of the Atlantic Provinces where rivers have been considered navigable unless they were tidal, and the courts have throughout acted on the basis that the English law prevails. There are, it is true, some *dicta* by Strong J. in New Brunswick cases before the Supreme Court of Canada that the *ad medium filum* rule does not apply to navigable waters,¹⁰⁵ but there are contrary *dicta*, and in any event, these were given before the *Kenora* case.¹⁰⁶ The probabilities, therefore, are that in the few places in the Atlantic Provinces where rivers may be navigable in fact, though not tidal, the *ad medium filum* rule would apply.

International Boundaries

There have also been numerous *dicta* in Ontario cases that the *ad medium filum* rule does not apply to navigable waters forming the international boundaries.¹⁰⁷ But the bulk of these (though by no means all),¹⁰⁸ had reference to the St.

98. *Parker v. Elliott* (1852), 1 U.C.C.P. 470; *Gage v. Bates* (1858), 7 U.C.C.P. 116; *Dixon v. Snetsinger* (1873), 23 U.C.C.P. 235; *Cram v. Ryan* (1894), 25 O.R. 524; *Barthel v. Scotten* (1895), 24 S.C.R. 367; *Attorney-General of Ontario v. Wynne* (1903), 3 O.W.R. 1132; *Stover v. Lavoia* (1906), 8 O.W.R. 398; affirmed: (1907), 9 O.W.R. 117; *Keewatin Power Co. v. Town of Kenora* (1906), 13 O.L.R. 237; reversed: (1908), 16 O.L.R. 184; *Hamilton Steamboat Co. v. McKay* (1907), 10 O.W.R. 295.

99. (1908), 16 O.L.R. 184; followed: *Williams v. Pickard* (1908), 17 O.L.R. 547; *Haggerty v. Latreille* (1913), 14 D.L.R. 532; *Barber v. Andrews* (1921), 20 O.W.N. 239.

100. *Fares v. R.*, [1932] S.C.R. 78.

101. R.S.O., 1970, c. 41.

102. *Re Iverson and Greater Winnipeg Water District* (1921), 57 D.L.R. 184, distinguishing *Patton v. Pioneer Navigation and Sand Co.* (1908), 7 W.L.R. 744.

103. *Flewelling v. Johnston* (1921), 59 D.L.R. 419; *Clarke v. City of Edmonton*, [1930] S.C.R. 137; *R., Ex. Rel. Baillie v. Miller*, [1941] 1 W.W.R. 483.

104. See especially *Boyd v. Fudge* (1965), 46 D.L.R. (2d) 679.

105. *Reg. v. Robertson* (1882), 6 S.C.R. 52; *Re Provincial Fisheries* (1895), 26 S.C.R. 444.

106. See *Reg. v. Robertson* (1882), 6 S.C.R. 52, *per Ritchie C.J.*; see also *per Gwynne J.* in the Exchequer Court.

107. *Gage v. Bates* (1858), 7 U.C.C.P. 116; *Reg. v. Robertson* (1882), 6 S.C.R. 52; *Cram v. Ryan* (1894), 25 O.R. 524; *Barthel v. Scotten* (1895), 24 S.C.R. 367; *Re Village of Fort Erie and Buffalo and Fort Erie Public Bridge Co.* (1927), 61 O.L.R. 502.

108. *Gage v. Bates* (1858), 7 U.C.C.P. 116; *Cram v. Ryan* (1894), 25 O.R. 524; *Keewatin Power Co. v. Town of Kenora* (1908), 16 O.L.R. 184; *Isherwood v. Ontario and Minnesota Power Co.* (1911), 18 O.W.R. 459; *Re Village of Fort Erie and Buffalo and Fort Erie Public Bridge Co.* (1927), 61 O.L.R. 502.

Lawrence River and the Great Lakes, and were decided before the *Kenora* case.¹⁰⁹ In the *Kenora* case, the judges could see no reason not to apply the presumption to international waters. They noted that the numerous properties ending at the international boundary on land had not given rise to international difficulties.

Nor should the fact that the thalweg,¹¹⁰ rather than the center of the stream, constitutes the international boundary prevent the application of the principle, though it would have to be modified accordingly. The underlying principle is that it is inconceivable that in ordinary circumstances a landowner would in granting a piece of land retain the strip under the water: it should make no difference that the strip extends to the thalweg rather than *ad medium filum aquae*. However, the question cannot be regarded as settled. In *Re Village of Fort Erie and Buffalo and Fort Erie Public Bridge Co.*,¹¹¹ the Ontario Court of Appeal noted that the *ad medium filum* rule had never been applied to international waters, and held it could not apply to the River Niagara because the international boundary was defined in the Treaty of Peace as the "middle of the communication into Lake Erie", and the actual boundary (which involved considerable variation from that definition) was only settled later. The problem could only arise in the Atlantic Provinces in respect of waters in the St. Croix and Saint John River systems.

Lakes

The application of the *ad medium filum* rule to lakes raises problems of no little difficulty. After considerable vacillations, it now appears settled that under English law the rule applies to lakes and ponds as well as running streams.¹¹² However, the experience of the United States and Ireland is sufficiently different to warn against the automatic application of English law to the Canadian situation.¹¹³

The only cases in the Atlantic Provinces are those in New Brunswick. There it has been held in no less than four cases that the *ad medium filum* rule has no application to lakes, and that property adjoining a lake extends only to the margin of the water.¹¹⁴ A piece of land on which a lake is situate or a boundary line crossing a lake would, of course, raise a different question. All but one of these cases, however, were decided before the English law became settled.

The later case is *McDonald v. Linton*¹¹⁵ before the Supreme Court of New Brunswick. It concerned South Oromocto Lake, a body of water of elliptical shape, 3½ miles in length and 1½ miles in width and varying in depth from 18 inches to 24 feet. It was described as being non-tidal and non-navigable. Chief Justice Barry held that an adjoining owner did not, in the absence of express words, own *ad medium filum aquae*. The presumption in his view did not apply to New Brunswick lakes, the English rule being inapplicable to the situation and conditions of the province. The differences between the English and New

109. *Keewatin Power Co. v. Town of Kenora* (1908), 16 O.L.R. 184.

110. For a discussion of the thalweg, see pp. 333-4.

111. (1927), 61 O.L.R. 502.

112. See Coulson and Forbes on *Waters and Land Drainage*, 6th ed. (London, 1952), pp. 123-7.

113. See *ibid.* and the authorities there cited.

114. *Burke v. Niles* (1870), 13 N.B.R. 166; *Niles v. Burke* (1873), 14 N.B.R. 237; *Nash v. Newton* (1891), 30 N.B.R. 610; *McDonald v. Linton* (1926), 53 N.B.R. 107.

115. (1926), 53 N.B.R. 107.

Brunswick situations do not, however, appear substantial enough to warrant a different rule. In fact, the House of Lords case apparently settling the English law, *Johnson v. O'Neil*,¹¹⁶ dealt with Lough Neagh, the largest lake in the Kingdom, which is 24 miles long. It is true, as Chief Justice Barry notes, that under English law, there is no public right to fish in non-tidal waters, whereas here the bed would belong to the Crown, which could, of course, allow the public to use it. In addition, he felt that even if the *ad medium filum* rule might be generally applicable, it was inapplicable to New Brunswick lakes. This was certainly true of the lake in question, for it had no *medium filum* in the sense of a river or stream; if it did, it must have two: one from the sides and one from the ends. Moreover, he did not think the question was finally settled in England. He noted that Lord Blackburn had drawn attention to the inconvenience of adding to the property of every landowner of a few acres on Lough Neagh a strip of land under the lake of many miles in length. He also noted that Lord Blackburn had carefully distinguished that situation from the case where a lake or pond was wholly comprised within a piece of land. In such a case, of course, there could be no doubt that the lake or pond would go with the land. The other judges in *McDonald v. Linton*, Hazen C.J. and White J., decided the case on another point not germane to the issue, but the former stressed that he was not expressing any opinion on the right of riparian owners in non-tidal lakes.

Turning to authority in other Canadian provinces, there is authority in Ontario holding that the beds of navigable lakes did not pass to the adjoining owner. But the exclusion of the rule was not based on the view that it did not apply to lakes, but rather that it did not apply to navigable waters.¹¹⁷ This theory, however, was discarded by the *Kenora* case,¹¹⁸ and in any event it never found favour in the Atlantic Provinces. The Great Lakes are so large that, as the courts have held, it would be inconceivable to apply the rule to them in a conveyance of a small piece of land.¹¹⁹ But there is no comparable situation in the Atlantic Provinces.

The problem of navigability apart, the Ontario case of *Gordon v. Hall and Hall*¹²⁰ holds that a grant of land adjacent to a non-navigable lake goes *ad medium filum aquae*, and there are several other Canadian cases where it appears to be taken for granted that the rule applies to lakes as well as rivers.¹²¹ Of course, the terms of a conveyance and the circumstances may indicate a different mode of partition. Thus in *Williams v. Salter and Karwick*,¹²² the plaintiff and defendant each owned one half of lot 12, the dry land of each being situated on opposite sides of Caribou Lake, a non-navigable lake 1½ miles long and around ¼ mile wide. From the situation of the lake, if the *ad medium filum* rule had applied, one of the parties would have owned more land than the other. An Ontario Divisional

116. [1911] A.C. 552.

117. *Stover v. Lavoie* (1906), 8 O.W.R. 398; affirmed: (1907), 9 O.W.R. 117; see also *Re Provincial Fisheries* (1895), 26 S.C.R. 444.

118. *Keewatin Power Co. v. Town of Kenora* (1908), 16 O.L.R. 184.

119. *Ibid.*; *Carroll v. Empire Limestone Co.* (1919), 45 O.L.R. 121.

120. (1959), 16 D.L.R. (2d) 379.

121. See *Attorney-General of Quebec v. McManamy* (1907), 3 E.L.R. 179; *Carroll v. Empire Limestone Co.* (1919), 45 O.L.R. 121.

122. (1912), 23 O.W.R. 34.

Court held that each owned half of lot 12, including the land and water without distinction; the boundary line was a straight line in the lake parallel to the opposite boundaries of lot 12.

Conveyances Extending to Water Only

A number of cases have dealt with problems concerning the exact demarcation to be made when conveyances are held not to extend beyond the edge of the water. Where the *ad medium filum* rule applies, such problems are not likely to arise, but some mention may be made of them in case the New Brunswick rule respecting lakes prevails. In any event, the cases may be useful in interpreting grants where an intention appears to exclude waters.

Some cases speak of the "shore" of inland lakes and rivers, and take the expression as meaning the area between high and low water marks,¹²³ those points to be determined at ordinary levels of water.¹²⁴ These cases held that the conveyances in question carried ownership to low water mark.¹²⁵ But the prevailing view is that the term shore is inappropriate to non-tidal water.¹²⁶ "Banks" is the preferred terminology, and a river or lake, therefore, consists of three parts: the waters, the bed and the banks.¹²⁷ For this purpose the banks are the natural elevations that contain the waters when they rise out of the bed,¹²⁸ the bed being the area usually covered by water.¹²⁹ And, despite some cases to the contrary, it would appear that the line of demarcation between the bed and the bank is to be found by an examination of the soil and vegetation, and not by taking the high or low water marks or the medium stage of the water.¹³⁰ As already seen, in the absence of evidence to the contrary, "banks" *prima facie* has reference to banks as thus defined and usually carries ownership *ad medium filum*, and not to the high banks some distance from the water at ordinary levels that characterize some rivers.¹³¹

Finally, it may be mentioned that where the Crown has not conveyed the beds of inland lakes and rivers, it belongs to the Crown in right of the province, and not of the Dominion, unless expressly transferred to the latter.¹³²

123. *Parker v. Elliott* (1852), 1 U.C.C.P. 470; *Stover v. Lavoia* (1906), 8 O.W.R. 398; affirmed: (1907), 9 O.W.R. 117; *Kennedy v. Husband*, [1923] 1 D.L.R. 1069.

124. *Ross v. Portsmouth* (1866), 17 U.C.C.P. 195; *Stover v. Lavoia* (1906), 8 O.W.R. 398; affirmed: (1907), 9 O.W.R. 117; *Kennedy v. Husband*, [1923] 1 D.L.R. 1069.

125. *Stover v. Lavoia* (1906), 8 O.W.R. 398; affirmed: (1907), 9 O.W.R. 117; *Kennedy v. Husband*, [1923] 1 D.L.R. 1069; *R. v. Lakeside Orchards Ltd.*, [1929] 1 W.W.R. 870; see also *Huntley v. Jeffers* (1906), 1 E.L.R. 385.

126. See *Parker v. Elliott* (1852), 1 U.C.C.P. 470.

127. See *Coleman v. Robertson* (1880), 30 U.C.C.P. 609; *Clarke v. City of Edmonton*, [1930] S.C.R. 137.

128. *Williams v. Pickard* (1908), 17 O.L.R. 547; *Clarke v. City of Edmonton*, [1930] S.C.R. 137.

129. *Clarke v. City of Edmonton*, [1930] S.C.R. 137; *Boyd v. Fudge* (1965), 46 D.L.R. (2d) 679.

130. *Clarke v. City of Edmonton*, [1930] S.C.R. 137; cf., *Stover v. Lavoia* (1906), 8 O.W.R. 398; affirmed: (1907), 9 O.W.R. 117; *Kennedy v. Husband*, [1923] 1 D.L.R. 1069.

131. See pp. 242-3.

132. *Attorney-General of Canada v. Attorney-General of Ontario*, [1898] A.C. 700.

CHAPTER ELEVEN

Federal Statutes Respecting Rivers, Streams and Lakes

*By Gerard V. La Forest and Alan D. Reid**

NAVIGATION

The Navigable Waters Protection Act

Introduction

The Navigable Waters Protection Act,¹ as the name implies, was enacted to protect the navigable waters of Canada.² It consists of three parts.³ Part I requires the approval of the Minister of Transport for the erection of works that may interfere with navigation, and provides for the removal of works built without such approval. Part II establishes a procedure empowering the Minister to remove wrecks and other obstructions from navigable waters. Part III authorizes the making of regulations respecting ferry cables and swing and draw bridges. Each of these Parts must now be examined.

Part I

This Part prohibits the building or placing in, upon, over or under, through or across any navigable water of any work unless certain conditions are met. First, the site and plans of the work must be approved by the Minister of Transport before construction begins, and he may attach such terms and conditions to this approval as he thinks fit.⁴ Secondly, construction must begin within six months and be completed within three years of the approval or within such further period as the Minister may fix.⁵ Finally, the work must be built, placed and maintained in accordance with the plans, the regulations made under the Act and the terms and conditions set out in the approval.⁶ For the purposes of the Act, "navigable water" includes a canal and any other body of water created or altered as a result of the construction of a work.⁷ The term "work" includes

- (i) any bridge, boom, dam, wharf, dock, pier, tunnel or pipe and the approaches or other works necessary or appurtenant thereto,
- (ii) any dumping of fill or excavation of materials from the bed of a navigable water,

* The former prepared the work on the Navigable Waters Protection Act; the latter prepared the rest of the chapter.

1. R.S.C., 1970, c. N-19.

2. See *Champion and White v. City of Vancouver*, [1918] 1 W.W.R. 216 (S. Ct. Can.), per Fitzpatrick C. J.

3. *Ibid.*, s. 5.

4. *Ibid.*, s. 2.

5. *Ibid.*, s. 5 (1)(b).

6. *Ibid.*, s. 5 (1)(c).

7. *Ibid.*, s. 2.

- (iii) any telegraph or power cable or wire, or
- (iv) any structure, device or thing, whether similar in character to those referred to in this paragraph or not, that may interfere with navigation.⁸

Despite the broad terms of the definition, it would appear to be limited to permanent works. Thus in *Kennedy v. The Surrey*,⁹ it was held not to apply to temporary booms for tying up logs, even though work is defined as including booms. Though there is an early case holding that the Act has no application to a person building a wharf on his own land,¹⁰ it hardly seems open to doubt that a wharf is included because it is expressly enumerated in the definition. Until recently dredging was not included in the definition but it now appears to be covered by sub-paragraph (ii).¹¹

The Minister of Transport may exempt minor structures from the application of the Act notwithstanding that they may fall within the definition of a work under the provision that any work, other than a bridge, boom, dam or causeway, is exempted from the foregoing prohibition if, in his opinion, it does not interfere substantially with navigation.¹² The Minister also has a power of making exemptions from the Act in relation to the rebuilding or repairing of a "lawful work", i.e. any work not contrary to the law in force at the time of its construction; such a work may be rebuilt or repaired if, in his opinion, the interference with navigation is not increased by the rebuilding or repairing.¹³

Two other exceptions to the prohibition are made by the Act. First, any bridge constructed before May 17, 1882, that requires to be rebuilt or repaired is not affected by the prohibition if such bridge when so rebuilt or repaired would not interfere with navigation to a greater extent than it did on that day or therefor.¹⁴ Secondly, except insofar as it relates to rebuilding, repairing or altering a lawful work, as above defined, Part I does not apply to any work constructed under any Act of Parliament or of the legislature of a province passed before the province became a part of Canada.¹⁵ This would appear to mean, for example, that no permission would be required under the Act for a work authorized by the legislature of Newfoundland before the union of that province with Canada, even if the work was actually constructed after the union. There is a statement in one case, however, that the section is limited to works performed before union,¹⁶ though the logic of this opinion is difficult to grasp.

The manner of applying to the Minister for approval to construct a work in navigable waters is thus set forth.¹⁷ On applying, the applicant must also deposit the plans of the work and a description of the proposed site with the Minister, and a duplicate of each in the office of the registrar of deeds for the district, county or province where the work is to be constructed. He must also give one

8. *Ibid.*, s. 3.

9. (1905), 10 Ex. C.R. 29.

10. *Huntley v. Jeffers* (1906), 1 E.L.R. 385, but see *London v. City of Vancouver* (1934), 49 B.C.R. 328.

11. *International Fertilizers Ltd. v. Harbour Development Ltd.* (1968), 67 D.L.R. (2d) 688.

12. R.S.C., 1970 c. N-19, s. 5(2).

13. *Ibid.*, ss. 3, 9(1).

14. *Ibid.*, s. 7.

15. *Ibid.*, s. 3.

16. *Baldwin v. Chaplin* (1915), 21 D.L.R. 846.

17. R.S.C., 1970, c. N-19, s. 8.

month's notice of the deposit of the plans and application by advertisement in the Canada Gazette and in two newspapers published in or near the locality where the work is to be constructed. By virtue of regulations¹⁸ a fee of \$500 is imposed on an applicant seeking "approval for the commencement of the construction of the work prior to full compliance with the requirements of the Act."¹⁹ If this wording simply imposes a fee on applicants in the normal case, it is unnecessarily tortuous. If it means that the Minister may give an approval in the absence of full compliance with the Act, its validity is open to question.

As already mentioned, approval must ordinarily precede construction. However, the Act²⁰ provides that the Minister may, subject to the deposit and advertisement as in the case of a proposed work and the payment of the fee prescribed by regulations,²¹ approve a work and its plans and site after construction has begun; and such approval has the same effect as if given before construction began.

Until 1969, there was no provision stating the period during which an approval lasted and, presumably, it was permanent. It is now provided, however, that regulations may prescribe its period of validity.²² The Navigable Waters Works Regulations²³ prescribe that an approval is valid for 50 years from its effective date or such lesser period as may be set out in the approval, but this provision applies only to approvals given after the commencement of the regulations, i.e. January 14, 1970. Moreover, where the Minister approves commencement of construction of a work before full compliance with the requirements of the Act, the approval is valid only for a period of six months, but this provision does not apply to a work (other than a bridge, boom, dam or causeway) that, in the opinion of the Minister, does not substantially interfere with navigation, or one whose construction began before the regulations came into force.²⁴ It is difficult to see under what section of the Act the latter provision can be enacted, and consequently what legal effect this approval can have.²⁵ Where an approval lapses, the Minister may grant a new approval of the work for such period as he deems fit having regard to changing conditions in navigation and the condition of the work.²⁶ Where an application for a new approval is made, the work remains a lawful work pending the Minister's decision.²⁷

The Act also makes provision for the approval of alterations to a lawful work as above defined. It provides that any such work may be altered if plans of the proposed alteration are deposited with and approved by the Minister, and, in his opinion, the interference with navigation is not increased by the alteration.²⁸ Where, in the opinion of the Minister, lawful work has become a danger to, or interference with, navigation by reason of the passing of time and changing

18. *Ibid.*, s. 6(5).

19. Navigable Waters Works Regulations, SOR/70-35.

20. As enacted by (1968-9), 17 & 18 Eliz. II, c. 15, s. 4 (Can.).

21. Ss. 5(5), 10(1)(a), as enacted by *ibid.*, ss. 4, 7.

22. Ss. 5(6), 10(1)(b), as enacted by *ibid.*, ss. 4, 7.

23. SOR/70-35, s. 3(1).

24. *Ibid.*, s. 3(2), (3).

25. The general regulation-making power under s. 10(1), as enacted under R.S.C., 1970, c. N-19, s. 10, constitutes at best doubtful support.

26. R.S.C., 1952, c. 193, s. 9(4).

27. *Ibid.*, s. 9(5).

28. *Ibid.*, s. 9(2).

conditions in navigation of the navigable waters concerned, any rebuilding, repair or alteration of the work must be treated in the same manner as a new work.²⁹

Where a work to which Part I applies is built or placed without having been approved by the Minister, or is built or placed on a site that has not been so approved, or is not built or placed in accordance with plans so approved, or is not maintained in accordance with such plans or the regulations, the Minister may order the owner (a term that includes a person authorizing or otherwise responsible for the erection or maintenance of a work, and an actual or reputed owner or possessor or a person claiming ownership) to remove or alter the work.³⁰ He may also order any person to refrain from proceeding with the construction of the work if, in his opinion, it interferes or would interfere with navigation or is being constructed contrary to the Act.³¹ Anyone who fails to comply with any such order is liable on summary conviction to a fine not exceeding \$5,000 dollars.³² Moreover, if an owner of a work fails to comply with an order forthwith, the Minister may remove and destroy the work and sell, give away, or otherwise dispose of the material contained in the work,³³ and the costs incidental to such operation, after deducting any sum realized by sale or otherwise, are recoverable with costs in the name of Her Majesty from the owner.³⁴

It is also arguable that the construction of a work in navigable waters, being an unlawful act, may make the person doing so liable for an action by anyone suffering damage by reason of the existence of the unlawful work. The point has not yet been settled because in the cases where damage has arisen from the existence of such a work, the work constituted such an interference with navigation as to amount to a public nuisance at common law, which gave rise to an action on the part of a person who suffered special damages.³⁵ It could only come up in concrete form where a work was constructed in navigable waters that violated the Act but did not constitute such an interference with navigation as to be categorized as a public nuisance.

The act does not in terms provide that a person who receives approval to build or maintain a work in navigable waters acquires any right that he would not have had if the Act had not been passed. It is purely permissive. Not surprisingly, therefore, the courts have held that approval under the Act does not authorize any interference with the private rights of others. For example, it does not authorize a person to build on a site that belongs to another, or to interfere with the right of access of a riparian owner,³⁶ or to interfere with the flow of water to a riparian owner's land.³⁷ There are some judicial utterances, however, that indicate that it may authorize interferences with the public right of navigation.³⁸ But even this is extremely doubtful. The Act is purely permissive, and it

29. *Ibid.*, s. 9(3).

30. *Ibid.*, s. 6(1)(a).

31. *Ibid.*, s. 6(1)(c).

32. *Ibid.*, s. 6(2).

33. *Ibid.*, s. 6(1)(b).

34. *Ibid.*, s. 6(3).

35. See *London v. City of Vancouver* (1934), 49 B.C.R. 328; *Stephens and Mathias v. MacMillan*, [1954] 2 D.L.R. 135.

36. *Irving Oil v. Rover Shipping Co.* (1961), 45 M.P.R. 311.

37. *Isherwood v. Ontario and Minnesota Power Co.* (1911), 18 O.W.R. 459.

38. See *ibid.*

was intended not to permit interferences with, but as its name implies, to protect navigation. Thus a person who has suffered special damages by reason of a work that constitutes an interference with navigation should be able to bring a successful action against the person who caused the work to be placed there notwithstanding that approval was received under the Act. And the court may order the abatement of such nuisance. This was the opinion of the Chief Justice of Canada, Fitzpatrick C.J., in *Champion and White v. City of Vancouver*.³⁹

One further point should perhaps be mentioned. While there is one case against the proposition,⁴⁰ it would appear that the courts may, in according compensation for the compulsory taking of land covered by navigable waters, take into consideration that approval to build a work thereon may be obtained at some future time.⁴¹

Finally, section 10 of the Act⁴² authorizes the Governor in Council to make orders and regulations respecting navigation and works to which Part I applies, including plans and sites of such works; this includes power to prescribe fees and the period during which approvals are valid (reference to which has already been made) as well as the punishment to be imposed (not to exceed a fine of \$500 or six months imprisonment, or both) on summary conviction for violations of such orders or regulations. It should be remembered, too, that the approval of a work is dependent on its being built, placed and maintained in accordance with the regulations, and for failure to do so the Governor in Council may have the work removed or altered.

Under this section, the Navigable Waters Works Regulations have been enacted.⁴³ Some of these regulations are general in character. Thus section 4 prohibits the building or placing of a work in navigable waters unless all lights, buoys and other marks required in the approval are installed and maintained to the satisfaction of the Minister. Section 5 provides that no person may permit any tools, equipment, vehicles, temporary structures or parts thereof used in placing or building a work in navigable water to remain in the water after completion of the project. Section 6 provides that where a work or a portion thereof that is being built or maintained in navigable water causes debris or other material to accumulate on the bed or surface of the water, the owner must have it removed to the satisfaction of the Minister. The regulations also requires the owner of a work to notify the office of the district marine agent, district manager or superintending engineer of the Marine Services of the Department of Transport within whose district a work is located of any lights or signals that have ceased to function or of any change in the position of a work or any other facts affecting the safety of navigation.⁴⁴ Anyone who violates any provision of the regulations is guilty of an offence punishable on summary conviction by a fine not exceeding \$500 or to imprisonment for not more than six months or to both.⁴⁵

39. [1918] 1 W.W.R. 216; see also *Nicholson v. Moran*, [1949] 4 D.L.R. 571.

40. *R. v. Wilson* (1914), 15 Ex. C.R. 283; see also *Gillespie v. R.* (1909), 12 Ex. C.R. 406.

41. *Cunard v. The King* (1910), 43 S.C.R. 88; *London v. City of Vancouver* (1934), 49 B.C.R. 328, 42 R.S.C., 1970, c. N-19.

42. SOR/70-35.

44. *Ibid.*, ss. 2(b), 14.

45. *Ibid.*, s. 15.

In addition to these general regulations, there are provisions respecting particular types of works. Thus the owner of a dam or power plant must, when required by the Minister, install, maintain and operate log chutes to permit the passage of logs, provide and maintain roads or foot-ways for the free passage of the public by vehicle or foot around the work between the upper and lower reaches of the river, and furnish the Minister with all records of flow, elevation of water above and below the work and all plans and other material relating to navigation that may be required by the Minister.⁴⁶ The Minister or his representative is to be permitted to measure the discharge of water in the various channels through or over a work.⁴⁷ Finally, the owner of the work is required to maintain the limits of flow and elevation of water required by the Minister.⁴⁸

The regulations also deal with works used in connection with resource development. Where a work is built or placed for the purposes of exploration or development of natural resources, and the transport, removal or handling of such resources from the waters or bed of a navigable water (whether the work is of a permanent, temporary or floating character and whether fixed to the bed or otherwise moored by anchors, stubs or cables), the owner is required to install and maintain certain lights, as follows: (a) on a work having a maximum horizontal dimension of 30 feet or less on any one side or through any diameter thereof, one light visible in all directions; (b) on a work having a minimum horizontal dimension exceeding 30 feet but less than 50 feet on any one side or through any diameter thereof, two lights on diagonally opposite corners or in a position satisfactory to the Minister, each visible in all directions and mounted on the same horizontal plane; and (c) on a work having a maximum horizontal dimension of over 50 feet on one side or through any diameter thereof, a light visible in all directions at each corner of the work or at the outer limits of each quadrant thereof with 90° separation, mounted on the same horizontal plane.⁴⁹ Any such light must be white, displaying a quick flash characteristic of 60 flashes per minute with an intensity of not less than 75 candelas, be powered by a reliable power source and possessing an auxiliary power source, and be so installed that on a clear night at least one light will be visible from any vessel that is not more than 50 feet from the work.⁵⁰ Such lights must be displayed between sunset and sunrise, and where there is more than one, they must flash in unison.⁵¹

The owner of such a development work must also install and maintain on the work a sound signal that is powered by a reliable source of power, possesses an auxiliary power source, emits a sound of two seconds duration with eighteen seconds pause during every period of twenty seconds at a frequency of 400 Hertz, plus or minus 10%, and has an intensity of not less than 117 decibels measured at twenty-five feet.⁵² Such sound signal must be installed not less than ten, and not more than one hundred feet above the surface of the water, and be so placed that

46. *Ibid.*, s. 7(1), (2).

47. *Ibid.*, s. 7(3).

48. *Ibid.*, s. 7(4).

49. *Ibid.*, s. 8(1).

50. *Ibid.*, s. 8(2).

51. *Ibid.*, s. 8(3).

52. *Ibid.*, s. 9.

the signal is audible in all directions from the work when there is no wind.⁵³ It must be sounded whenever the visibility is less than five miles in any direction.⁵⁴

Finally, the owner of such a development work must install on the work identification panels with such block letters or numerals as are assigned to him by the approval of the Minister.⁵⁵ These letters and numerals must be black, not less than three feet high, installed on a yellow background, and outlined with retro-reflecting material or retroreflectors or illuminated by night⁵⁶

It may also be mentioned that there are separate regulations, the Ferry Cables Regulations⁵⁷ and the Navigable Waters Bridges Regulations,⁵⁸ dealing with ferry cables and bridges, but these are more germane to Part III of the Act and will be dealt with in the discussion of that Part.

Part II

Part II of the Navigable Waters Protection Act establishes a procedure empowering the Minister of Transport to remove wrecks and other obstructions from navigable waters, and prohibiting the dumping of certain materials in such waters.

At common law, the owner of a vessel becoming an obstruction to navigation was not responsible for the consequences of the obstruction or the costs of removing it in the absence of negligence or wilful default on his part or of persons in control of it.⁵⁹ The Act provided a new procedure which is probably based on the Imperial Harbours, Docks and Piers Clauses Act, 1847.⁶⁰ Though there are divergent opinions, the preponderance of authority supports the view that the Act has superseded whatever remedies the Crown may have had at common law against an owner for the removal of a ship that became an obstruction to navigation through his fault or that of his servants.⁶¹ Until recently the minority opinion received support from section 23 which provided that nothing in Part II was to be construed as exempting any owner, master or other person from any obligation or responsibility imposed on him by any other law or authority not incompatible with the Minister's powers under the Act, but that section has now been repealed.⁶² The point need not be pursued further because it is unlikely to arise unless there has been a failure to comply with the procedure spelled out in the Act.

Section 13(1) of the Act provides that where the navigation of any navigable waters over which the Dominion has jurisdiction is obstructed, impeded or

53. *Ibid.*, s. 10.

54. *Ibid.*, s. 11.

55. *Ibid.*, s. 12(1).

56. *Ibid.*, s. 12(2).

57. SOR/57-434.

58. SOR Consolidation, 1955, vol. 3, p. 2471; P.C. 1954-1751 of Nov. 18, 1954.

59. *North West Navigation Co. v. Walker* (1885), 3 Man. R. 25; *Reg. v. Mississippi and Dominion Steamship Co.* (1894), 4 Ex. C.R. 298; *Anderson v. R.* (1919), 59 S.C.R. 379; *Attorney-General of Canada v. Brister*, [1943] 3 D.L.R. 50; *Sauvageau v. R.*, [1950] S.C.R. 664.

60. 10 & 11 Vict., c. 27 (see ss. 74, 56) (Imp.); see *R v. Mississippi and Dominion Steamship Co.* (1894), 4 Ex C.R. 298; *Sauvageau v. R.*, [1950] S.C.R. 664.

61. *Reg. v. Mississippi and Dominion Steamship Co.* (1894), 4 Ex. C.R. 298; *Attorney-General of Canada v. Brister*, [1943] 3 D.L.R. 50, *per* Chisholm C.J. and Hall J. (cf. Smiley and Carroll J.J.); *Sauvageau v. R.*, [1950] S.C.R. 664, *per* Fauteux J.

62. See (1968-9), 17 & 18 Eliz. II, c. 15, s. 13 (Can.).

rendered more difficult by the wreck, sinking, or lying ashore of a vessel (or part thereof) or other thing, the owner, master or person in charge is required to notify the Minister or the collector of customs at the nearest or most convenient port, and to place and maintain a sufficient signal by day, and a sufficient light by night to indicate the position of the obstruction or obstacle so long as it continues.⁶³ A person who fails to do any of these things is liable on summary conviction to a fine not exceeding \$5,000 for each offence.⁶⁴ The owner is further obliged under section 13(3) to begin the removal of the obstruction forthwith and prosecute such removal diligently to completion, but this in no way limits the Minister's powers under the Act. Since no penalty is imposed on the owner for failure to comply with this obligation and the Minister's powers seem aimed at removing the obstruction to navigation rather than as a penalty, it is probable that the owner's failure to comply is punishable on indictment by imprisonment for two years under section 107 of the Criminal Code.⁶⁵

A few expressions in section 13(1) and in other sections of the Act require clarification. "Owner" means the registered or other owner at the time the obstruction is created, and includes subsequent purchasers.⁶⁶ Both the owner when the obstruction is created and subsequent purchasers are, therefore, placed under the obligations created by the Act. Who is a person in charge was discussed by Rand J. in *Sauvageau v. R.*⁶⁷ He there held that a person towing a wreck was not in charge of it for the purposes of the Act. This was a dissenting opinion, but he was not dissenting on this point. The other judges found the tug company not liable under the Act for other reasons, and did not consider the point. Rand J.'s view is, therefore, of high persuasive authority. The term "vessel" also requires clarification. It is broadly defined by section 12(c) to include every description of ship, boat or craft, including any part of its equipment, cargo, stores or ballasts. What "other thing" may constitute an obstruction is not spelled out, but having regard to the broad definition of vessel, the context, and the purposes of the Act, it would probably also be broadly construed. Support for this may be found in *Shenango Steamship Co. v. Soo Dredging Co.*⁶⁸ where it appears to be assumed that a boulder would come within the expression.

The Minister is given important powers in relation to obstructions in navigable waters. In the first place, if the owner fails to do so as required by section 13(1), the Minister may cause the signal or light to be placed on a vessel or other thing causing an obstruction to navigation.⁶⁹ Again if in the Minister's opinion (a) the navigation of navigable water is obstructed, impeded or rendered more difficult or dangerous by reason of the wreck, sinking, partial sinking or lying ashore or grounding of a vessel, or any part thereof, or of any other thing; (b) such navigation is likely to be obstructed, etc., by reason of the situation of

63. R.S.C., 1970, c. N-19, s. 13(1).

64. *Ibid.*, s. 26.

65. R.S.C., 1970, c. C-34, s. 115. These penalties are maximum penalties, which may be reduced and fines given in lieu of imprisonment in the discretion of the court; see the Code, ss. 644, 645.

66. R.S.C., 1970, c. N-19, s. 12; for the law before this definition, see *Reg. v. Mississippi and Dominion Steamship Co.* (1894), 4 Ex. C.R. 298.

67. [1950] S.C.R. 664; see also *Shenango Steamship Co. v. Soo Dredging Co.* (1915), 8 O.W.N. 530; affirmed: (1916), 9 O.W.N. 207.

68. (1915), 8 O.W.N. 530; affirmed: (1916), 9 O.W.N. 207.

69. R.S.C., 1970, c. N-19, s. 13(2).

any vessel, or part thereof or other thing so lying, sunk, etc.; or (c) any such vessel, wreck or other thing cast ashore on any Dominion property is an obstacle or obstruction to the use of the property for the public purposes of the Dominion, he may cause the wreck, vessel or other thing, if the situation continues for more than 24 hours, to be removed or destroyed in such manner and by such means as he thinks fit.⁷⁰ Under section 15 the Minister may cause such obstruction to be conveyed to such place as he thinks proper to be sold by auction or otherwise as he deems advisable, and apply the proceeds to make good the expenses incurred by him in placing or maintaining any signal or light to indicate the position of the obstruction or obstacle, or in its removal or destruction, and pay any surplus to the owner or other person entitled to it.

Where the Minister has exercised any of the above powers and the costs have been defrayed out of the public monies of Canada, such costs constitute a debt due and recoverable by the Dominion.⁷¹ At one time, such costs could only be recovered in the case of a removal of a wreck, as opposed to its destruction, where a sale had been made pursuant to section 15, even where such a sale was obviously impractical.⁷² But since 1954, it has been clearly provided that the amount may be recoverable "whether or not a sale has been held under section 15". However, the action is in the nature of a personal tort, and the Supreme Court of Nova Scotia has held that in the absence of a provision making the action continue on death, the estate of a person liable under the Act could not be successfully sued thereunder, and there was then no Nova Scotia statute continuing such actions.⁷³

A new section was enacted in 1969 to deal with a vessel anchored, moored or adrift in navigable waters in such a manner that, in the opinion of the Minister, it obstructs or is likely to obstruct navigation.⁷⁴ Where he is of that opinion the Minister may order the owner, managing owner, master or person in charge of the vessel to remove it to such place as the Minister deems fit, and if such person fails to comply forthwith, he is liable on summary conviction to a fine not exceeding \$5,000, and the Minister may order the vessel removed to such place as he deems fit, the costs being recoverable against such person as a debt due to Her Majesty.

The powers of the Minister respecting vessels or other things wrecked, sunk, lying ashore or grounded in navigable waters are rounded out by a provision that any such vessel or thing shall be deemed to be abandoned at the end of two years from the date of the casualty, and thereupon the Minister, under such restrictions as to him seem fit, may authorize any person to take possession thereof for his own benefit on giving the owner, where known, one month's notice, and where unknown, notice for a similar period in a local paper published nearest to the place of the wreck.

70. *Ibid.*, s. 14.

71. *Ibid.*, s. 16.

72. *Anderson v. R.* (1919), 59 S.C.R. 379; *Attorney-General of Canada v. Brister*, [1943] 3 D.L.R. 50, per Chisholm C.J. (Hall J. concurring); *Sauvageau v. R.* [1950] S.C.R. 664.

73. *Attorney-General of Nova Scotia v. Brister*, [1943] 3 D.L.R. 50.

74. R.S.C., 1952, c. 193, s. 16A, as enacted by (1968-9), 17 & 18 Eliz. II, c. 15, s. 9 (Can.); now R.S.C., 1970, c. N-19, s. 17.

Another series of sections prohibits the dumping of certain materials in navigable waters. Thus it is provided that no person shall throw or deposit or cause, suffer or permit to be thrown or deposited any sawdust, edgings, slabs, bark or like rubbish of any description whatsoever that is liable to interfere with navigation in any water, any part of which is navigable or flows into any navigable water.⁷⁵ Violation of this provision is punishable by a fine not exceeding \$5,000 for each offence.⁷⁶

A further section provides that no person shall throw or deposit or cause, suffer or permit to be thrown or deposited any stone, gravel, earth, cinders, ashes or other material or rubbish liable to sink to the bottom in any water, any part of which is navigable or flows into any navigable water, where there are not at least twenty fathoms of water at all times; the section is not to be construed as permitting the throwing or depositing of any substance in any navigable water where such action is prohibited under any other Act.⁷⁷ Violation of this section is punishable on summary conviction by a fine not exceeding \$5,000, and where such materials are thrown from or deposited by a vessel and a conviction is obtained therefor, the vessel is liable for the fine and may be detained by any port warden or collector of customs until it is paid.⁷⁸ The section contemplates material thrown on water that is liable to sink; in *Woods v. Opsal*⁷⁹ Macdonald J. of the Supreme Court of British Columbia did not think the section was aimed at preventing a riparian owner from filling in the foreshore in front of his property. In that case the filling in had started from the shore and gradually reached a point later termed the high water mark.

The Act provides for the making of exemptions to the foregoing sections. Thus the Governor in Council may by proclamation exempt any waters from the application of all or any part of these sections when he is satisfied that the public interest would not be prejudicially affected.⁸⁰ In the Atlantic Provinces, Shoal Arm, of Little Arm Bay, Notre Dame Bay, Newfoundland,⁸¹ Flora Lake, Labrador⁸² and a Wabush Lake water lot, in Newfoundland,⁸³ have been exempted from section 19.⁸⁴ Moreover the Minister may appoint places where stone, gravel, earth, cinders, ashes or other material may be deposited notwithstanding the depth of water in any navigable water not within the jurisdiction of harbour commissioners, harbour masters, port wardens, the National Harbours Board or The St. Lawrence

75. R.S.C., 1970, c. N-19, s. 19.

76. *Ibid.*, s. 27.

77. *Ibid.*, s. 19.

78. *Ibid.*, s. 26.

79. [1918] 1 W.W.R. 985.

80. R.S.C., 1970, c. N-19, s. 21.

81. SOR/61-196.

82. SOR/63-190.

83. SOR/61-23.

84. The exemptions of the latter waters were from former section 20, but that section and section 19 were repealed in 1969; though only section 19 was re-enacted the new section 19 replaced both the old sections 19 and 20 (see 1968-9), 17 & 18 Eliz. II, c. 15, s. 10; now R.S.C., 1970, c. N-19, s. 20. The exemptions, therefore, would continue by virtue of the Interpretation Act, R.S.C., 1970, c. I-23, s. 37(g) (Can.).

Seaway Authority.⁸⁵ The legal rights and duties of these officials and bodies are not affected by any of the provisions of the Act respecting the depositing of materials in navigable waters.⁸⁶

Part III

Part III provides for the making of regulations respecting ferry cables (defined as including any ferry cable, rod, chain or other device put across, over, in or under any navigable water for working a ferry)⁸⁷ and swing and draw bridges, other than railway bridges.⁸⁸ The regulations may govern the laying, stretching or maintaining of any ferry cable across, over, in or under any navigable water; the opening and closing of any swing or draw bridge over any navigable water; and the maintenance of lights and any other precautions for the safety of navigation in connection with any such cable or bridge.⁸⁹ The regulations may impose the punishment to be imposed on summary conviction, but such punishment must not exceed a fine of \$500 or imprisonment for a term of six months or both.⁹⁰

The Ferry Cable Regulations prohibit the laying, stretching or maintaining of a ferry cable across, over, in or under any navigable water without the written authorization of the Minister of Transport.⁹¹ A ferry cable is defined to include any ferry cable, rod, chain or other device put across, over, in or under any navigable water for working a ferry.⁹² An applicant for an authorization must submit to the Minister: (a) the proposed location of the cable and the depth of water, (b) the kind of operations contemplated, the specifications and description of the cable, the name of the operator (i.e., the person in charge of the raising and lowering of the cable and any operation connected with it),⁹³ and any other information required by the Minister.⁹⁴ The Minister has the absolute discretion to revoke any authorization he may give.⁹⁵ On the other hand, he may except any person from any of the regulations.⁹⁶ For reasons to be discussed in connection with the Navigable Waters Bridges Regulation,⁹⁷ discretionary power to make regulations inapplicable amounts to a delegation of power by the regulation making body, and the validity of such delegation is carefully scrutinized by the courts. However, the validity of this delegation is fortified by the fact that the Act itself grants similar exempting powers to the Minister.

The owner or operator of a ferry cable is required to ensure that the cable is clearly indicated by a beacon placed at one or both ends of the cable or as close thereto as possible and situated so that it can be seen from a vessel approaching the cable from any direction.⁹⁸ The beacon must consist of two square shapes at

85. R.S.C., 1952, c. N-19, s. 23.

86. *Ibid.*, s. 22.

87. *Ibid.*, s. 27.

88. *Ibid.*

89. *Ibid.*, s. 28.

90. *Ibid.*, s. 29.

91. SOR/57-454, ss. 2(d), (3).

92. *Ibid.*, s. 2(c).

93. *Ibid.*, s. 2(e).

94. *Ibid.*, s. 4.

95. *Ibid.*, s. 5.

96. *Ibid.*, s. 12.

97. See pp. 259-61.

98. SOR/57-434, s. 6(1).

least two feet square, one white and one red, visible at a distance of 600 yards and placed in a vertical line one over the other not less than two feet apart; the red square must be placed above the white square when the cable is in a raised position, and when the cable is down the red square must be placed under the white square.⁹⁹ By night the square shapes must be replaced by two lights, one red and one white, that are visible at a distance of at least 600 yards on a clear night.¹⁰⁰ The operator is required to ensure that such lights are kept burning from half an hour before sunset until half an hour after sunrise.¹⁰¹ In lieu of the beacon, the Minister may permit the operator to install a light system consisting of a red light, which must be shown when the cable is raised, and a green light, which must be shown when the cable is down; such lights must be visible for one mile by day or night and be so situated that they can clearly be seen from a vessel approaching the cable from any direction.¹⁰² The operator of a ferry cable is required to ensure that the beacon or light system is properly fixed and maintained in good working order and that the signals required by the regulations are shown at all times.¹⁰³ A number of definitions give precision to the foregoing requirements. A cable is "down" when it is resting on the river bed,¹⁰⁴ and it is "raised" when it is not.¹⁰⁵ Lights and other signals are "visible" when they are visible under normal atmospheric conditions.¹⁰⁶

The operator of a ferry cable is required to keep the cable down from half an hour before sunset until half an hour after sunrise except when it is actually in use.¹⁰⁷ The person in charge of a vessel approaching a cable with the intention of crossing is required to sound two long and two short blasts on a whistle or horn in sufficient time to permit the operator to lower the cable to the down position.¹⁰⁸ On hearing this signal the operator of the cable is required to lower the cable to the down position and, when satisfied that it is down, change the signal accordingly.¹⁰⁹ A person in charge of a vessel is prohibited from navigating it across a ferry cable when the beacon or signal lights indicate that it is raised.¹¹⁰

Finally, the regulations provide that any violations are punishable on summary conviction by a fine not exceeding \$50 and costs or imprisonment not exceeding ten days, or both.¹¹¹

The Navigable Waters Bridges Regulations¹¹² may be justified partially under Part III and partially under section 10. The regulations apply to every bridge over navigable waters constructed after November 17, 1923 (including a bridge under

99. *Ibid.*, s. 6(2).

100. *Ibid.*, s. 6(3).

101. *Ibid.*, s. 6(4).

102. *Ibid.*, s. 7.

103. *Ibid.*, s. 8.

104. *Ibid.*, s. 2(b).

105. *Ibid.*, s. 2(f).

106. *Ibid.*, s. 2(g).

107. *Ibid.*, s. 9.

108. *Ibid.*, s. 10(1).

109. *Ibid.*, s. 10(2).

110. *Ibid.*, s. 11.

111. *Ibid.*, s. 13.

112. SOR Consolidation, 1955, vol. 3, pp. 2470 *et seq.*; P.C. 1954-1751 of Nov. 18, 1954.

construction), and to any other bridge specified by the Minister of Transport.¹¹³ But the Minister may suspend their application to any bridge either permanently or temporarily.¹¹⁴ Moreover, the regulations do not apply to any bridge over a canal or over the waters of any public harbour to the extent that they are inconsistent with other regulations of the Governor in Council.¹¹⁵

There may be some question whether the power given to the Minister to bring certain bridges within the scope of the regulations, and to suspend their application to others is within the regulation-making power given by Part III. The power to make the regulations is there given to the Governor in Council, not the Minister. The power to sub-delegate this power (which is substantially what is done here) cannot be assumed. The courts will allow sub-delegation where this must have been contemplated having regard to the nature and structure of the Act. While the exempting sections are fortified by the similar powers given the Minister in sections 4(2) and 8(1) of the Act, this cannot be said of the power to bring persons within the scope of the regulations. The same observations apply to other sections of the regulations giving power to the Minister, but in each case in considering the validity or invalidity of the power, attention should be given to whether such delegation is reasonably necessary to give effect to the purpose for which the regulation-making power is given and its general accord with the structure of the Act.¹¹⁶

Where a bridge consists of more than one span, the Minister may prescribe the span or spans through which any passage for navigation is approved.¹¹⁷ At every bridge of one span or where navigation through one span only is approved, a white light must be exhibited on each side of the passage visible to ships approaching the bridge from either direction.¹¹⁸ Where passage under more than one span is approved, there must be exhibited a white light on each side of the passage visible to vessels approaching the bridge from the direction that brings such passage to the starboard of such vessels.¹¹⁹ Where passage under more than two spans is approved, the bridge must exhibit such lights as may be prescribed by the Minister.¹²⁰ At every moveable span (an expression that includes a lift, draw, swing or jack-knife span),¹²¹ there must be exhibited, in addition to the lights already mentioned, a light that shows red when the passage is closed and green when it is open, and if it is a swing span, a white light at each end of the swing protection.¹²² Moreover the Minister may prescribe additional lights and other aids to navigation, and may prescribe the intensity of all lights exhibited.¹²³ The duty of exhibiting, maintaining and operating the lights is placed on the owner

113. *Ibid.*, ss. 3(1), 2(a),(b).

114. *Ibid.*, s. 3(1).

115. *Ibid.*, s. 3(2).

116. For a discussion of the problem of delegation of regulation making power, see *Reference re Chemicals*, [1943] S.C.R. 1; *Ex Parte Brent* (1956), 2 D.L.R. (2d) 503 (S.Ct.Can.); see also, generally, Willis, "Delegatus Non Potest Delegare" (1943), 21 Can. Bar Rev. 257.

117. Navigable Waters Bridges Regulations, s. 5: SOR Consolidation, 1955, vol. 3, p. 2471; P.C. 1954-1751 of Nov. 18, 1954.

118. *Ibid.*, s. 6(1).

119. *Ibid.*, s. 6(2).

120. *Ibid.*, s. 6(3).

121. *Ibid.*, s. 2(c).

122. *Ibid.*, s. 7.

123. *Ibid.*, s. 8.

of the bridge.¹²⁴ The plan and description of a proposed bridge required to be submitted to the Minister of Transport by the Railway Act or to the Minister of Transport by the Navigable Waters Protection Act are not to be approved unless they indicate that lights are to be exhibited as provided in the regulations.¹²⁵

A person in charge of a vessel passing through or under a bridge where two passages have been approved must use the passage on the starboard side, and when there are more than two approved passages, the Minister is authorized to make special provisions governing navigation.¹²⁶

The owner of a moveable span, as above defined, must maintain a responsible person capable of operating the span at all times during the navigation season.¹²⁷ When a vessel approaching a moveable span gives a signal of three long blasts of a whistle or horn, the person in charge of the span is required to open the span in time to permit passage of the vessel or as soon thereafter as possible.¹²⁸ However, the Minister may prohibit the opening of a span for a specified period, in which case the person in charge is not to open it except under conditions prescribed by the Minister.¹²⁹ A vessel is not to enter a passage through or under a span until the span is fully open, unless the vessel can safely move under the span while it is closed.¹³⁰

Other Statutes

Another significant federal statute relating to navigation is the Railway Act,¹³¹ which forbids railway companies to cause obstructions in, or to impede the free navigation of rivers, streams or canals that come into contact with railways.¹³² Railway bridges spanning navigable waters or canals must be provided with a proper flooring to prevent anything falling into the canal or water, or on vessels or persons navigating the water.¹³³ The Canadian Transport Commissioners are empowered to direct that spans over such waters must be constructed in such a way as is necessary for the proper protection of navigation.¹³⁴ The Act further provides for supervision over the construction of works that come in contact with navigable waters and canals, by requiring that plans be filed with the Minister of Public Works, with respect to navigable waters, and, with respect to lands, with the Minister of Transport; plans are to be approved by the Governor in Council, and work authorized by the Canadian Transport Commissioners.¹³⁵

FLOATING

Under the Navigable Waters Protection Act,¹³⁶ regulations are in effect directing the installation of log chutes to permit the transport of logs through or over a

124. *Ibid.*, s. 9.

125. *Ibid.*, s. 4.

126. *Ibid.*, s. 11.

127. *Ibid.*, s. 10.

128. *Ibid.*, ss. 12, 13(1).

129. *Ibid.*, s. 13(2).

130. *Ibid.*, s. 13(3).

131. R.S.C., 1970, c. R-2.

132. *Ibid.*, s. 186.

133. *Ibid.*, s. 187.

134. *Ibid.*, s. 188.

135. *Ibid.*, s. 189.

136. R.S.C., 1970, c. N-19.

work in a navigable water.¹³⁷ Furthermore, by virtue of the Saint John River Log Boom Regulations¹³⁸ made under the Canada shipping Act,¹³⁹ navigational lighting for log booms in the Saint John River, its tributaries and all navigable waters connected therewith above the Reversing Falls is prescribed.¹⁴⁰ The Regulations also prohibit persons from navigating or anchoring a log boom so as to cause an unnecessary impediment or obstruction to vessels or other log booms using the same waters.¹⁴¹

Under the Dominion Water Power Act,¹⁴² the Governor in Council is empowered to make regulations to provide for the passage of logs over dams erected under the Act.¹⁴³

FISHING

Although fishing generally lies outside the scope of this study, there are provisions of the Fisheries Act¹⁴⁴ that relate to the use and obstruction of water in rivers, streams and lakes. Where the Minister of Fisheries deems it necessary in the public interest that a fish-pass should exist, every slide, dam or other obstruction across any stream must be provided with a fishway or canal around the slide, which is to be maintained in good condition by the owner in such form and capacity as will, in the Minister's opinion, permit the passage of fish. Where this is not feasible, the owner of the dam may be required by the Minister to pay whatever sum is required to construct, operate and maintain a complete fish hatchery establishment so as to meet the requirements for maintaining the annual return of migratory fish.¹⁴⁵

The Minister's approval must be obtained before the construction of a fishway or canal has begun,¹⁴⁶ and the owner must keep it open and unobstructed, and supplied with such quantity of water as the Minister considers necessary to enable fish to pass by.¹⁴⁷ Provision is made for the Minister authorizing the payment of one half of the expense incurred in the construction and maintenance of a fishway or canal.¹⁴⁸

Where a leak in a dam impairs the efficacy of a fishway, the Minister may require the owner to stop it up.¹⁴⁹ The Minister may, in addition, remove unused slides, obstructions or anything detrimental to fish, where the owner fails to do so after notice, without incurring liability for damages or compensation.¹⁵⁰

The Minister has further power to require an owner of a dam, slide or other obstruction to instal and maintain adequate fish stops, diverters and sluices;

137. SOR/70-35, s. 7(2)(a).

138. SOR/64-492.

139. R.S.C., 1970, c. S-19.

140. SOR/64-492, ss. 5, 6.

141. *Ibid.*, s. 7.

142. R.S.C., 1970, c. W-6.

143. *Ibid.*, s. 12 (k).

144. R.S.C., 1970, c. F-14.

145. *Ibid.*, s. 20(1).

146. *Ibid.*, s. 20(2).

147. *Ibid.*, s. 20(3).

148. *Ibid.*, s. 20(4).

149. *Ibid.*, s. 20(3).

150. *Ibid.*, s. 20(6).

to provide a sufficient flow of water over the spillway through connecting sluices to permit the safe descent of fish; and to make any other provisions during construction that the Minister requires to ensure the free passage of ascending and descending fish.¹⁵¹ An owner may further be required to permit sufficient water to escape into the river below the obstruction to provide for the safety of fish and for the flooding of spawning grounds to a depth that will ensure the safety of ova.¹⁵²

Further provisions prohibit persons from depositing ballast, coal ashes or other prejudicial or deleterious substances in rivers, harbours, roadsteads or in any waters where fishing is carried on; from depositing upon shores, beaches or banks or between high and low water mark, offal or fish or marine animals; and from leaving decayed or decaying fish in any net or fishing apparatus.¹⁵³ It is also an offence for a person to cause or knowingly permit lime, chemical substance or drug, poisonous matter, dead or decaying fish, mill rubbish, sawdust or other deleterious matters to be placed in any water frequented by fish, or water that flows into such water, or upon ice over such waters.¹⁵⁴ The Governor in Council may by order deem any substance to be a deleterious substance for this purpose.¹⁵⁵ Furthermore, persons engaging in logging, lumbering, land clearing or other operations are prohibited from depositing, or knowingly permitting the depositing of slash, stumps or other debris into waters frequented by fish, or flowing into such waters, or on ice or in a place from which it is likely to be carried into these waters.¹⁵⁶ Penalties are provided for breach of these provisions.¹⁵⁷

Recent amendments have been made to the Fisheries Act.¹⁵⁸ The new provisions prohibit persons from depositing or permitting the deposit of deleterious substances of any type in waters frequented by fish or in any place under any conditions where such substances (or any other deleterious substance that results from the deposit of such substances) may enter any such water.¹⁵⁹ "Deleterious substance" is defined as any substance that, if added to water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered deleterious to fish or to the use of fish that frequent that water,¹⁶⁰ and any water containing such a substance in such quantity or concentration or that has been so treated, processed or changed by heat or other means from a natural state that it would if added to any water have such a degrading or altering effect.¹⁶¹ "Water frequented by fish" includes all water in Canada's fishing zones.¹⁶² The prohibition does not apply, however, to deposits authorized by regulations under the Act or any other Act.¹⁶³

151. *Ibid.*, ss. 20(8), (9).

152. *Ibid.*, s. 20(10).

153. *Ibid.*, s. 33(1).

154. *Ibid.*, s. 33(2).

155. *Ibid.*, s. 33(4).

156. *Ibid.*, s. 33(3).

157. *Ibid.*, s. 33(5).

158. R.S.C., 1970, 1st Supp., c. 17.

159. *Ibid.*, s. 3(1), enacting s. 33(2).

160. *Ibid.*, s. 3(2), enacting s. 33(11).

161. *Ibid.*, enacting s. 33(11).

162. *Ibid.*, enacting s. 33(11).

163. *Ibid.*, enacting s. 33(4).

The amendments further provide that the Minister of Fisheries may require any person proposing the construction, alteration or extension of any works, the operation of which will be likely to result in the deposit of a deleterious substance into fish inhabited waters, to submit plans and specifications¹⁶⁴ which the Minister may modify or veto.¹⁶⁵ Inspectors may be appointed to help enforce this provision.¹⁶⁶

FLOW AND LEVEL

A number of federal public statutes authorize interferences with the flow and level of rivers, streams and lakes. Under the Railway Act,¹⁶⁷ railway companies are empowered to divert or alter, temporarily or permanently, the course of a river, stream, watercourse or highway or alter its level in order to carry it over, under or by the side of the railway more conveniently.¹⁶⁸ Companies are required, however, to restore any diverted river, stream or lake as nearly as possible to its former state, or put it in such a state as does not materially impair its usefulness,¹⁶⁹ and must pay compensation for damages occasioned by the lawful exercise of these powers.¹⁷⁰ These provisions apply as well to the Canadian National Railways by virtue of the Canadian National Railways Act.¹⁷¹ Similar powers may be exercised by the Minister of Transport under the Government Railways Act,¹⁷² which authorizes the Minister, with respect to railways vested in Her Majesty and under the control of the Minister, to construct and maintain a line across, along or upon any stream, watercourse or canal that it intersects or touches, on condition that it be restored either to its former state or to such state as does not impair its usefulness.¹⁷³

Under the Expropriation Act,¹⁷⁴ a Minister presiding over a department charged with the construction and maintenance of a public work may divert or alter the course of any river or other watercourse as he deems necessary for any purpose related to that work.¹⁷⁵ Compensation is provided for in the Act.¹⁷⁶

Further powers to alter and divert the level and flow of rivers, streams and lakes are set out in the Dominion Water Power Act and regulations, to be discussed later, and in the Northern Canada Power Commission Act, also to be discussed later.

Under the regulations promulgated pursuant to the Navigable Waters Protection Act,¹⁷⁷ a person who is constructing a power plant or dam on a navigable water must, on the Minister's request, furnish records of the flow and elevation of

164. *Ibid.*, enacting s. 33.1.

165. *Ibid.*, enacting s. 33.1(2).

166. *Ibid.*, enacting s. 33.2.

167. R.S.C., 1970, c. R-2.

168. *Ibid.*, s. 102(1)(1).

169. *Ibid.*, s. 103.

170. *Ibid.*, s. 104.

171. R.S.C., 1970, c. C-10, s. 16.

172. R.S.C., 1970, c. G-11.

173. *Ibid.*, s. 5(1)(h).

174. R.S.C., 1970, 1st Supp., c. 16.

175. *Ibid.*, s. 37(e).

176. *Ibid.*, s. 40.

177. R.S.C., 1970, c. N-19.

the water above and below the particular work,¹⁷⁸ and such a work is to be operated in such a manner as to maintain the limits of flow and elevation of water prescribed by the Minister.¹⁷⁹

POLLUTION

Several federal statutes contain provisions prohibiting the pollution of rivers, streams and lakes. Of primary importance is section 8 of the recently enacted Canada Water Act, already discussed in Chapter Two. This provision prohibits a person from depositing waste in waters comprising a water quality management area designated under the Act except in quantities and under conditions prescribed for that area. In addition to this the Fisheries Act¹⁸⁰ prohibits the depositing of deleterious substances in waters frequented by fish; the specific provisions are outlined more thoroughly above.¹⁸¹ Provisions under the regulations to the Migratory Birds Convention Act¹⁸² prohibit a person from knowingly causing or permitting the flow of oil, oil wastes or substances harmful to migratory water fowl into or upon waters frequented by such birds, or into waters flowing into such waters or ice thereon.¹⁸³

Under the Criminal Code,¹⁸⁴ the polluting of a river, stream or lake may fall under the "common nuisance" section,¹⁸⁵ where the effect is to endanger the public. And by virtue of regulations enacted under the Canada Shipping Act¹⁸⁶ to implement the International Convention for the Prevention of Pollution of the Sea by Oil, the discharge of oil into inland waters, by ships of any nationality¹⁸⁷ used in navigation,¹⁸⁸ so as to foul the surface is prohibited¹⁸⁹ and regulatory measures are prescribed to control and deter the escape of oil into waters from ships.¹⁹⁰ A further indirect control is provided by regulations under the Income Tax Act¹⁹¹ which, generally, permit the deduction of capital cost allowance in respect of property acquired primarily for the purpose of preventing, reducing or eliminating the pollution of any lake, river, stream, watercourse, pool, swamp or well by industrial waste, refuse or sewage created by operations in the course of carrying on business.¹⁹²

By virtue of regulations under the National Parks Act,¹⁹³ it is an offence to deposit refuse or other matters, to bathe or to wash any person, article or thing in an area in a park designated by the superintendent and marked by appropriate

178. SOR/70-35, s. 7(2)(c).

179. *Ibid.*, s. 7(4).

180. R.S.C., 1970, c. F-14.

181. See p. 76.

182. R.S.C., 1970, c. M-12.

183. SOR/66-361, s. 51.

184. R.S.C., 1970, c. C-34.

185. *Ibid.*, s. 176.

186. R.S.C., 1970, c. S-9. [now replaced by Part XX, see Addendum, pp. 484-92. See also the Arctic Waters Pollution Prevention Act, discussed in the Addendum at pp. 492-3].

187. SOR/68-434, s. 3.

188. *Ibid.*, s. 2(h).

189. *Ibid.*, ss. 4, 8 (with the exception of discharge for such reasons as security, or unavoidable leakage, *ibid.*, ss. 6, 9).

190. *Ibid.*, ss. 10-12.

191. R.S.C., 1952, c. 148.

192. SOR/66-54.

193. R.S.C., 1970, c. I-5.

signs as a source of water supply.¹⁹⁴ Further provisions relate to the regulation of sewage installations, the construction of wells in parks and the obstruction of sewage systems.¹⁹⁵ It is further provided that no person shall pollute a stream or other body of water or obstruct a stream in a park, except as authorized by the Director of National Parks for the purpose of taking water for domestic, business or railway purposes under permit.¹⁹⁶ Other regulations relate to the abatement of nuisances in national parks.¹⁹⁷ Fishing regulations prohibit the release of deleterious substances into park waters.¹⁹⁸

RIGHTS TO USE

Consumption

Under regulations enacted pursuant to the National Parks Act,¹⁹⁹ the Director of National Parks is authorized to issue permits to take water for domestic, business and railway purposes within a park from any spring, stream, lake, well or other park supply system other than a waterworks system for a townsite or subdivision.²⁰⁰ The Minister is empowered to enter into agreements with municipalities or water districts adjacent to parks for supplying water to parks, and may enter into agreements with persons residing on land adjacent to a park to supply park water for domestic purposes and for use in establishments providing tourist accommodation.²⁰¹ Further regulations authorize the Minister to permit water to be taken from any park supply system to a place outside the park, in the case of drought, fire, contamination or other emergency.²⁰²

Power Development

Under the Dominion Water Power Act,²⁰³ the Minister of Indian Affairs and Northern Development is authorized to develop water power on federal government lands. This includes the power to make use of water in rivers, brooks, lakes, ponds, creeks or other waters²⁰⁴ flowing on federal lands,²⁰⁵ and to store, pen back, regulate, augment, carry or divert it in order to develop its potential. The powers of the Minister extend to the expropriation of lands for the purpose of developing or protecting Dominion water power,²⁰⁶ and the Governor in Council is empowered to make regulations, relating to the storage, pondage, regulation, diversion, carriage or utilization of the water and for the protection of its sources;²⁰⁷ relating to the regulation and control, in the interest of all water users, of the flow that may,

194. SOR/68-440, s. 6.

195. *Ibid.*, ss. 7-9.

196. National Parks General Regulations, SOR Consolidation, 1955, vol. 3, p. 2446, s. 14.

197. *Ibid.*, ss. 16-22.

198. SOR/67-175, s. 23.

199. R.S.C., 1970, c. N-13.

200. SOR/55-360, s. 2.

201. *Ibid.*, s. 3.

202. SOR/65-103, s. 3.

203. R.S.C., 1970, c. W-6.

204. *Ibid.*, s. 2.

205. *Ibid.*

206. *Ibid.*, s. 6.

207. *Ibid.*, s. 12(a).

from time to time, pass through, by or over such works;²⁰⁸ relating to the regulation of storage works for regulating and augmenting the flow of water required for power and other purposes;²⁰⁹ and relating to the passage of logs over dams erected under the Act.²¹⁰

Under the regulations,²¹¹ an application for a licence to divert, use or store water for power purposes may be made to the Director of Water Power,²¹² containing, among other specifications, such information as the name of or a clear description of the watercourse from which the water is to be diverted or used,²¹³ the place from which the water is to be diverted and to which it is to be returned or released,²¹⁴ the maximum quantity of water to be used or diverted,²¹⁵ the estimated average head in feet available for power production,²¹⁶ the dimensions of the dam,²¹⁷ the location of each lake, basin or other place in which it is desired to store water,²¹⁸ the acreage to be flooded as a reservoir and total capacity,²¹⁹ a description of lands to be used or flooded within public lands, provincial Crown lands and privately owned lands,²²⁰ a sketch of the project,²²¹ a description and sketch of neighbouring works using or diverting water from the same source of supply,²²² the name and location of other works or structures, bridges, railways or canals which might affect or be affected by the proposed works,²²³ and the rate of discharge at or near the place of diversion.²²⁴ Provision is also made for notice and hearings with respect to applications, and for the issuing of survey permits.

The Minister, where satisfied that the development is in accord with the most beneficial utilization of the waters, that the undertaking is feasible and in the public interest, and that the applicant has the financial ability to complete the project, may issue a priority permit giving the applicant priority over other applicants in the consideration of his general layout plans.²²⁵ These plans must be filed with the Director.²²⁶ The Minister is further empowered to issue an interim licence for carrying out the proposed development,²²⁷ specifying the manner of payment and rates to be paid as rentals or royalties for lands and waters.²²⁸ The applicant is then required to file his general construction plans with the Director within the period specified in the interim licence.²²⁹

208. *Ibid.*, s. 12(c).

209. *Ibid.*, s. 12(h).

210. *Ibid.*, s. 12(k).

211. Dominion Water Power Regulations, SOR Consolidation, 1955, vol. 1, p. 1002.

212. Appointed under R.S.C., 1970, c. W-6, s. 11.

213. SOR Consolidation, 1955, vol. 1, p. 1002, s. 3(1)(b).

214. *Ibid.*, s. 3(1)(c).

215. *Ibid.*, s. 3(1)(d).

216. *Ibid.*, s. 3(1)(e).

217. *Ibid.*, s. 3(1)(i).

218. *Ibid.*, s. 3(1)(j).

219. *Ibid.*, s. 3(1)(k).

220. *Ibid.*, s. 3(1)(l).

221. *Ibid.*, s. 3(2)(a).

222. *Ibid.*, s. 3(2)(b).

223. *Ibid.*

224. *Ibid.*, s. 3(2)(c).

225. *Ibid.*, s. 7(1).

226. *Ibid.*, s. 6.

227. *Ibid.*, s. 8(1).

228. *Ibid.*, s. 8(2).

229. *Ibid.*, s. 9(1).

Further requirements relate to the filing of surveys and specifications for approval, upon the filing of which construction must be undertaken within six months²³⁰ and a guarantee deposit filed with the Director within sixty days;²³¹ provision is also made for the filing of final construction plans,²³² for the fixing of construction costs by the Minister,²³³ for operation under an interim licence,²³⁴ for the amending of interim licences,²³⁵ for the granting of extensions of time by the Minister²³⁶ and for imposing penalties for a default by an interim licensee.²³⁷

Upon fulfilling the terms of the interim licence, the licensee is entitled to a final licence, authorizing the diversion, use or storage of water at the site for the development and use of energy, and for the occupation of such public lands as are required for the operation of the works.²³⁸ The licence sets out the rates and rentals for lands and water and such other terms as the Minister may impose.²³⁹ A licence cannot exceed fifty years,²⁴⁰ and after thirty years the Crown may retake possession.²⁴¹ However, provision is made for granting bonuses in such cases, as well as for extending rights held under the licence.²⁴² Upon expiration of the licence, the power development becomes Crown property²⁴³ and the regulations provide for compensation to be paid by the Minister. Further provisions relate to rentals for the use of water,²⁴⁴ the revision of rentals,²⁴⁵ rights in lands affected by licences²⁴⁶ and the maintenance and care of lands.²⁴⁷ The regulations further permit the Minister to order a licensee to develop increased power which he feels the flow is capable of,²⁴⁸ and to offer a licence for an enlarged development to a licensee where he feels that the enlarging of the development is feasible;²⁴⁹ a failure to take a new licence may result in the termination of an existing licence.²⁵⁰

It is further specified that every licence is deemed to have been executed on the express condition that the licensee shall divert, use or store the water in a manner that will not interfere with the maximum advantageous development of the power and other resources of the river or stream upon which the works are located;²⁵¹ that the licensee will comply with any orders in respect of the control or regulation of the flow of the waters that are made by the Minister;²⁵² and that he will not cause or permit the surface level of the waters of such river or

230. *Ibid.*, s. 12(4).

231. *Ibid.*, s. 13(1).

232. *Ibid.*, ss. 17, 18.

233. *Ibid.*, s. 19.

234. *Ibid.*, s. 20.

235. *Ibid.*, s. 21.

236. *Ibid.*, s. 22.

237. *Ibid.*, s. 23.

238. *Ibid.*, s. 25.

239. *Ibid.*, s. 25(4).

240. *Ibid.*, s. 26(1).

241. *Ibid.*, s. 26(2).

242. *Ibid.*, s. 27.

243. *Ibid.*, s. 28(1).

244. *Ibid.*, s. 30.

245. *Ibid.*, s. 31.

246. *Ibid.*, ss. 33-36.

247. *Ibid.*, ss. 37-48.

248. *Ibid.*, s. 48.

249. *Ibid.*, s. 49(3).

250. *Ibid.*, s. 49(5).

251. *Ibid.*, s. 54(a).

252. *Ibid.*, s. 54(b).

stream, or of any storage reservoir, to be altered beyond the limits fixed by the Minister.²⁵³ Licensees are further required to comply with the provisions of the Navigable Waters Protection Act and any orders and regulations made under that Act,²⁵⁴ and with the provisions of any provincial or federal statute or regulation governing the preservation of the purity of water or governing logging, forestry, fishing or other interests affected by operations under his licence.²⁵⁵

The Minister is further empowered to enter into cooperative agreements with provincial authorities to provide that owners of water privileges under provincial jurisdiction shall bear a due share in the cost²⁵⁶ of storage and regulatory works undertaken by the federal government, or by a commission, board, company or person authorized by the federal government, for the control or augmentation of the flow of a stream for water power or other purposes.²⁵⁷ Subject to the co-operation of the proper provincial authorities, the Minister may, upon approval by the Governor in Council, specify conditions under which owners of irrigation, logging, navigation or other interests upon a stream benefitted by regulating or storage works shall share in the cost of the undertaking.²⁵⁸

Further provisions authorize the issue of licences to develop small water powers, which cannot, under average flow conditions, produce in excess of five hundred horsepower and are not of primary importance for commercial or public utility purposes.²⁵⁹ The procedures for obtaining these licences are relatively uncomplicated.

Under the Northern Canada Power Commission Act²⁶⁰ (applicable primarily in the Northwest Territories and Yukon Territory, but also elsewhere in Canada where the approval of the Governor in Council has been obtained for a project), the Northern Canada Power Commission is empowered to undertake surveys and engineering investigations for the development of power projects,²⁶¹ to construct and maintain dams for storage and power purposes,²⁶² to flood and overflow land for the purpose of storing water,²⁶³ to raise or lower the level of rivers, lakes, streams and other bodies of water,²⁶⁴ to make stream or river diversions,²⁶⁵ and to enter upon and erect plants on, under or over any rivers, streams or waterways.²⁶⁶ The exercise of these powers is subject, however, to the approval of the Governor in Council,²⁶⁷ and the powers can only be exercised subject to the laws of the affected province,²⁶⁸ which would seem to indicate that the powers cannot be compulsorily exercised in derogation of the rights normally attributable to riparian owners and to other owners of private property which might be affected.

253. *Ibid.*, s. 54(c).

254. *Ibid.*, s. 67(a).

255. *Ibid.*, s. 67(b).

256. *Ibid.*, s. 56(1).

257. *Ibid.*, s. 55(2).

258. *Ibid.*, s. 56(2).

259. *Ibid.*, s. 69(1).

260. R.S.C., 1970, c. N-21.

261. *Ibid.*, s. 6(1)(a).

262. *Ibid.*, s. 6(1)(d).

263. *Ibid.*

264. *Ibid.*, s. 6(1)(e).

265. *Ibid.*

266. *Ibid.*, s. 6(1)(f).

267. *Ibid.*, s. 6(1).

268. *Ibid.*

CHAPTER TWELVE

New Brunswick Statutes Respecting Rivers, Streams and Lakes

By Alan D. Reid

GENERAL

Unlike Newfoundland and Nova Scotia, there is no legislation in New Brunswick declaring Crown ownership of provincial waters. Except for legislation reserving riparian ownership to the Crown, discussed below, the general common law rules continue to apply, subject, of course, to numerous specific uses and interferences discussed under the headings that follow.¹

FLOATING

Public Statutes

New Brunswick legislation makes significant provision for the floating of logs on rivers and streams. Under the Stream Driving Companies Act,^{1a} the Lieutenant-Governor in Council may, by letters patent, confer powers specified in the Act upon a company incorporated under the Companies Act for the purpose of acquiring or constructing and maintaining a dam, slide, pier, boom or other work necessary to facilitate the transmission of timber down a river or stream in the province, or for the purpose of blasting rocks, dredging or removing shoals or other impediments, or otherwise improving the navigation of a river or stream.² Provision is also made for the issuing of supplementary letters patent for the extension or improvement of works or the undertaking of new works.³ Applicants must give notice to licensees of upstream locations as well as to other interested persons,⁴ and must submit a report to be laid before the Minister of Natural Resources containing a description of the works to be undertaken and an estimate of their cost, an estimate of the quantity of different kinds of timber expected to come down the river or stream yearly, and a schedule of tolls.⁵ A company may propose by-laws for the regulation of the transmission of timber through the company works,⁶ which must be annexed to the above mentioned report, and which become the by-laws of the company upon issuance of letters patent.⁷ Upon incorporation, a company is required to complete and maintain works un-

1. See now Addendum, pp. 494-5.

1a. R.S.N.B., 1952, c. 219.

2. *Ibid.*, s. 2.

3. *Ibid.*, s. 52.

4. *Ibid.*, s. 4.

5. *Ibid.*, s. 5.

6. *Ibid.*, s. 9.

7. *Ibid.*, s. 10.

dertaken by it and mentioned in its pre-incorporation report, upon pain of losing its corporate powers and being held liable for damages.⁸ The powers conferred upon such a company do not entitle it to improve any river or stream for which another company has been formed, without the consent of that other company,⁹ nor to obstruct navigable waters or to collect tolls, except on timber.¹⁰ Extensive provisions are made for the imposition and recovery of tolls.¹¹

Such companies are further empowered to take possession of slides, piers, booms or other works previously established by a person, other than a company authorized under the Act, to facilitate the passage of timber down any water. In such a case the owner can claim compensation for the value of the work either in money or in stock of the company.¹² This does not authorize companies, however, to take or injure any mill site upon which there are existing mills, machinery, or hydraulic works other than those for facilitating the passage of timber,¹³ and no work may be commenced which interferes with or endangers a mill site without obtaining either the consent of the proprietor or an arbitration award as provided for in the Act.¹⁴ It would further appear that Crown property cannot be injured without the consent of the Crown;¹⁵ nor may private property be injured or interfered with without the consent of the owner or occupier, except in accordance with arbitration proceedings set out in the Act.¹⁶

The Act further provides that where the existence of a company is limited in time by its letters patent, works constructed by the company for the transmission of timber become Crown property, and no right to compensation vests in the shareholders of the expired corporation.¹⁷ This period may be extended, however, by order in council.¹⁸ The Crown may also take over the works of a company, upon payment of compensation, where the Lieutenant-Governor in Council declares the company dissolved and its works to be provincial works expedient to the public interest.¹⁹

Further provisions relate to the administration of the affairs of such corporations, in making returns and reports to the Minister.

The Dams and Sluiceways Act²⁰ provides for the installation of a proper sluice in a dam erected or to be erected across a river or stream to facilitate the driving of logs downstream. In the Act as passed in 1966 (though not yet proclaimed), a person may call upon a surveyor of dams, appointed by the Minister of Natural Resources,²¹ to examine the dam or dam site.²² (Formerly the Surveyor of Dams for the Parish was required to report to the County Council.) Upon a

8. *Ibid.*, ss. 47-48.

9. *Ibid.*, s. 14.

10. *Ibid.*, s. 34.

11. *Ibid.*, ss. 36-46.

12. *Ibid.*, s. 31.

13. *Ibid.*, s. 33.

14. *Ibid.*

15. *Ibid.*, s. 13.

16. *Ibid.*, ss. 22-30.

17. *Ibid.*, s. 16.

18. *Ibid.*, s. 51.

19. *Ibid.*, s. 50.

20. R.S.N.B., 1952, c. 56; repealed and new Act, (1966), 15 Eliz. II, c. 7 (N.B.), but not proclaimed.

21. (1966), 15 Eliz. II, c. 7, s. 2 (N.B.).

22. *Ibid.*, s. 3.

surveyor's recommendation, the Minister may serve notice on the owner of the dam to construct a sluiceway;²³ failure to comply with this notice may render the owner liable to a fine; in addition, the Minister may order the sluiceway built²⁴ at the owner's expense.²⁵ The law is currently in an unsatisfactory state. Until the proclamation of the new Act the former Act remains in effect, although its purposes are unattainable owing to the abolition of county councils as political organs in this province.

Private Statutes

General

There are also a number of private Acts incorporating and regulating boom companies and log driving companies. What follows is not an exhaustive analysis of these statutes but a resumé of the general provisions they frequently contain.

The early economic importance of the waterways of New Brunswick as the primary source of transportation for lumber and pulp industries is readily apparent from a survey of the private statutes of the province, particularly during the period from 1860 to 1900, and to a lesser extent from 1900 to the 1930s. The proliferation of boom company incorporations, Acts authorizing the erection of booms in various rivers and Acts incorporating stream and log driving companies bring to light the importance of the floating aspect of these water resources during these periods. The number of enactments also presents very real difficulties in attempting to ascertain with any degree of certainty the present state of the statute law.

A number of general statements concerning each group of companies will be made. It can be seen that the Acts readily group themselves into classes because of the functions they were incorporated to fulfil. A major problem is in determining whether the incorporations of these companies and the consequent powers and privileges are still valid today. Most of the incorporations were to be valid only for a limited time, for example, 5, 10, 20 years,²⁶ and despite frequent revivals and continuations, have probably expired. An attempt will be made under the various headings to indicate those that appear to have expired under statutory limitations and those that have not. It is conceivable that a company that has legally expired may be in operation, and one that has not legally expired may no longer be in operation. Another standard provision that causes difficulty in this respect is one that states that the company is to fulfil certain requirements within a time period, such as the erection and certification of proper booms, in default of which the powers and privileges given in its Act of incorporation would be deemed null and void.²⁷ Thus, some of the companies may never, in fact, have come into existence.

Boom Companies

Most statutes incorporating boom companies begin with a statement that the company constitutes a body corporate, with all the general powers and privileges incidental to a corporation, for the purpose of erecting and maintaining booms,

23. *Ibid.*, s. 4(1).

24. *Ibid.*, s. 4(2).

25. *Ibid.*, s. 4(3).

26. See, for example, (1900), 63 Vict., c. 84, s. 17 (N.B.).

27. See, for example, (1884), 47 Vict., c. 61, s. 14 (N.B.).

piers, dams and other works the company may think necessary for the convenient collecting and sorting of logs, pulp wood and other timber floating down the particular river or its tributaries.²⁸ The approval of the Minister of Public Works is required in some cases and in others the consent of the Lieutenant-Governor in Council.²⁹ The Acts define the limits or the portion of the stream or river within which the company is to carry on its activities, stating in many instances the number of miles and the geographical points between which the booms are to operate.³⁰

A duty is imposed on companies to preserve the free navigation of waterways, it being stated that the incorporation Act does not constitute an authorization for interference with the navigation of the river.³¹ Also, a company is often obligated by the incorporation Act to collect and float down to the booms the timber in the river within the defined limits.³² As well, the company is to have its booms open to receive timber from the spring of the year until a specified time, usually in the late fall.³³

Provision is also made in incorporating enactments for the protection of the companies' booms by prohibiting the encumbering of booms and by penalizing their wilful destruction.³⁴

Many of the early incorporating Acts provided that nothing in the Act was to be construed as authorizing entry by the corporation or its agents upon private property or its use for the purpose of erecting booms, without the consent of the owner.³⁵ However, in some of the later Acts companies were granted full power to enter upon, occupy, possess and use for their purposes the adjoining lands of private persons or corporations.³⁶ Provision was made for the compensation of owners.³⁷ Some enactments required, as well, that a plan be laid before the Lieutenant-Governor in Council for approval before the placing or erection of piers, showing the number and location of the proposed piers.³⁸

A variation common to this category of company is that provided by the incorporation of a "mill and boom company". The powers given to these companies are wider than those given to boom companies, and include authorizations for the erection of dams and sluices in addition to piers and booms.³⁹ The dams are to aid in the production of water power for the mills.⁴⁰ A right is also given to flow-water upon adjoining land sufficient to give power for the mills, but no unnecessary damage is to be done, and the company is to be liable for damages incidental to the taking of such lands. Where dams are to be erected, provision is made for sluiceways for the passage of lumber in the Saint John River.⁴¹

28. See, for example, (1862), 25 Vict., c. 74, s. 1 (N.B.).

29. See, for example, (1895), 58 Vict., c. 69, s. 4 (N.B.).

30. See, for example, (1914), 4 Geo. V, c. 68, s. 1 (N.B.).

31. See, for example, (1844), 7 Vict., c. 34, s. 5 (N.B.).

32. See, for example, *ibid.*, s. 8.

33. See, for example, (1867), 30 Vict., c. 85, s. 8 (N.B.).

34. See, for example, *ibid.*, s. 14.

35. See, for example, (1847), 10 Vict., c. 76, s. 3. (N.B.).

36. See, for example, (1900), 63 Vict., c. 84, s. 2 (N.B.).

37. See, for example, *ibid.*

38. See, for example, (1895), 58 Vict., c. 69, s. 4 (N.B.).

39. See, for example, (1884), 47 Vict., c. 61, s. 2 (N.B.).

40. See, for example, *ibid.*

41. See, for example, (1884), 47 Vict., c. 61, s. 7 (N.B.).

Fishways must also be provided.⁴² As well, fisheries regulations in force from time to time are to be observed. Many Acts provide for the appointment of a boom master by the Lieutenant-Governor in Council, whose duties are of a general supervisory nature, and, more specifically, the supervision of the passing of lumber through the open spaces to be left in the boom through which lumber is to be permitted to pass.⁴³

As already mentioned, many boom companies were originally incorporated to continue for a limited period. Sometimes this period was extended by statute.⁴⁴ In many cases the period, whether original or extended, has expired, so these companies would no longer appear to be legally in existence.⁴⁵ Another group of boom companies were not limited for any period, and would, therefore, appear to be legally in existence. They would not, however, necessarily be operating today. This group includes the following:

- (1) Baker Brook Mill and Boom Company;⁴⁶
- (2) Barnaby River Boom Company;⁴⁷
- (3) Hammond River Boom and Driving Co.;⁴⁸
- (4) Madawaska Mill and Boom Company;⁴⁹
- (5) North West Boom Company;⁵⁰

42. See, for example, *ibid.*

43. See, for example, *ibid.*, s. 11.

44. See, for example, (1945), 9 Geo. VI, c. 90, s. 9 (N.B.).

45. Among these companies are the following: Arestock Boom Company (see (1844), 7 Vict., c. 49; (1845), 8 Vict., c. 91; (1848), 11 Vict., c. 51; (1855), 18 Vict., c. 15; (1858), 21 Vict., c. 68); Bartibog Boom Company (see (1904), 4 Edw. VII, c. 80; (1906), 6 Edw. VII, c. 76; (1910), 10 Edw. VII, c. 90; (1918), 8 Geo. V, c. 95; (1935), 25 Geo. V, c. 79); Bathurst Boom Company (see (1900), 63 Vict., c. 84); Cain's River Boom Company (see (1862), 25 Vict., c. 74; (1872), 35 Vict., c. 54); Chipman Boom Company (see (1864), 27 Vict., c. 39); Fredericton Boom Company (see (1844), 7 Vict., c. 34; (1848), 11 Vict., c. 50; (1855), 18 Vict., c. 14; (1869), 32 Vict., c. 28; (1888), 51 Vict., c. 53; (1895), 58 Vict., c. 78; (1907), 7 Edw. VII, c. 59); Grand Falls Power and Boom Company (see (1895), 58 Vict., c. 69); Jacquet River Boom Company (see (1875), 38 Vict., c. 127; (1878), 41 Vict., c. 91; (1886), 53 Vict., c. 19; (1896), 63 Vict., c. 96; (1907), 7 Edw. VII, c. 75; (1910), 10 Edw. VII, c. 48; (1926), 16 Geo. V, c. 58; (1945), 9 Geo. VI, c. 90); Meduxnikik Boom Co. (see (1845), 8 Vict., c. 49; (1847), 10 Vict., c. 80; (1860), 23 Vict., c. 16; (1874), 37 Vict., c. 61; (1889), 57 Vict., c. 35; (1910), 10 Edw. VII, c. 59; see also *Meduxnikik Boom Co. v. Dalton* (1885), 25 N.B.R. 28); Markawickac Boom Company (see (1853), 16 Vict., c. 65; Nashwaak Boom Company (see (1845), 8 Vict., c. 55; (1848), 11 Vict., c. 52; (1850), 13 Vict., c. 9; (1854), 17 Vict., c. 59; (1855), 18 Vict., c. 63; (1857), 20 Vict., c. 33; (1858), 21 Vict., c. 71; (1860), 23 Vict., c. 74); Queddy River Driving and Boom Company (see (1882), 45 Vict., c. 100); Restigouche Boom Company (see (1879), 42 Vict., c. 30; (1881), 44 Vict., c. 63; (1883), 46 Vict., c. 70; (1885), 48 Vict., c. 34; (1890), 53 Vict., c. 63; (1891), 54 Vict., c. 45; (1892), 55 Vict., c. 52; (1893), 56 Vict., c. 74; (1908), 8 Edw. VII, c. 55); Richibucto Boom Company (see (1867), 30 Vict., c. 85); Saint Stephen Upper Mills Boom Company (see (1849), 12 Vict., c. 6; (1852), 15 Vict., c. 74); South Bay Boom Company (see (1847), 10 Vict., c. 10; (1884), 47 Vict., c. 31 (N.B.), see also *South Bay Boom Co. v. Jewett* (1862), 10 N.B.R. 267; *Dever v. South Bay Boom Co.* (1872), 14 N.B.R. 109).

46. See (1895), 58 Vict., c. 82 (N.B.).

47. See (1914), 4 Geo. V, c. 68; (1920), 10 Geo. V, c. 114 (N.B.).

48. See (1903), 3 Edw. VII, c. 97 (N.B.).

49. See (1884), 47 Vict., c. 61 (N.B.).

50. See (1862), 25 Vict., c. 64; (1883), 46 Vict., c. 62; (1891), 54 Vict., c. 43; (1894), 57 Vict., c. 67; (1897), 60 Vict., c. 94; (1900), 63 Vict., c. 85; (1916), 6 Geo. V, c. 66; (1918), 8 Geo. V, c. 75; (1920), 10 Geo. V, c. 115; (1927), 17 Geo. V, c. 81; (1950), 14 Geo. VI, c. 61 (N.B.). It is to continue until 1999.

- (6) Saint Stephen Middle Boom Company;⁵¹
- (7) South West Boom Company;⁵²
- (8) Southern Boom and Driving Company;⁵³
- (9) Tabusintac Boom Company;⁵⁴
- (10) Tobique River Boom Company;⁵⁵
- (11) Tracadie Boom Co.⁵⁶

Log and Stream Driving Companies

It is characteristic of log and stream driving companies, as with boom companies, that they are incorporated for limited periods of time;⁵⁷ however, it is commonplace for such companies to be revived by subsequent legislation long after they have ceased to function according to the original Act.

A number of these companies appear to have expired.⁵⁸ Another group of companies are not limited for any period, and would appear to be legally in existence. They would not, however, necessarily be operating today. This group includes the following:

- (1) Digdeguash Lakes and Stream Driving Co.;⁵⁹
- (2) Eel River Log Driving Co.;⁶⁰
- (3) Maduxnikik Stream Driving Co.;⁶¹
- (4) Musquash River Stream Driving Co.;⁶²
- (5) Oromocto River Driving Co.;⁶³
- (6) Pirate Brook River Driving Company;⁶⁴
- (7) Pokiok Stream Driving Co.;⁶⁵
- (8) South West River Log Driving Co.⁶⁶

51. See (1852), 15 Vict., c. 77 (N.B.).

52. See (1854), 17 Vict., c. 10; (1862), 25 Vict., c. 107; (1872), 35 Vict., c. 44; (1874), 37 Vict., c. 107; (1881), 44 Vict., c. 62; (1883), 46 Vict., c. 61; (1890), 53 Vict., c. 56; (1897), 60 Vict., c. 70; (1902), 2 Edw. VII, c. 90; (1916), 6 Geo. V, c. 90; (1931), 21 Geo. V, c. 63; (1933), 23 Geo. V, c. 49; (1938), 28 Geo. V, c. 117 (N.B.).

53. See (1911), 1 Geo. V, c. 118 (N.B.).

54. See (1874), 37 Vict., c. 104; (1909), 9 Edw. VII, c. 96; (1918), 8 Geo. V, c. 85 (N.B.).

55. See (1888), 51 Vict., c. 34 (N.B.).

56. See (1911), 1 Geo. V, c. 123; (1918), 8 Geo. V, c. 86 (N.B.).

57. See *e.g.* (1876), 39 Vict., c. 63, s. 17 (N.B.).

58. These include the following: Back Creek Stream Driving Company (see (1873), 36 Vict., c. 100); Coverdale River Log Driving Company (see (1901), 1 Edw. VII, c. 82; (1906), 6 Edw. VII, c. 71); Duck Brook River Driving Company (see (1874), 37 Vict., c. 103); Foster and McAdam Brooks River Driving Company (see (1873), 36 Vict., c. 90); Madawaska Log Driving Company (see (1891), 54 Vict., c. 48); Magaguadavic River Driving Company (see (1886), 49 Vict., c. 31); Pollet River Log Driving Company (see (1876), 39 Vict., c. 63 (N.B.)).

59. See (1865), 28 Vict., c. 41 (N.B.).

60. See (1875), 38 Vict., c. 129 (N.B.).

61. Provided for by (1875), 38 Vict., c. 143 (N.B.). It repeals (1867), 30 Vict., c. 83 incorporating the Meduxnikik River Driving Co.

62. See (1869), 32 Vict., c. 86 (N.B.).

63. See (1867), 30 Vict., c. 84 (N.B.).

64. See (1860), 23 Vict., c. 90 (N.B.).

65. See (1872), 35 Vict., c. 39 (N.B.).

66. See (1881), 44 Vict., c. 69; (1900), 63 Vict., c. 74; (1904), 4 Edw. VII, c. 76; (1911), 1 Geo. V, c. 114; (1915), 5 Geo. V, c. 99 (N.B.); (1926), 16 Geo. V, c. 47; see also *South West River Driving Co. v. Lynch* (1907), 38 N.B.R. 242.

Acts of incorporation of these companies usually begin with a statement of the purposes of the company. This is generally stated to be the clearing out of the particular waterway and the building and repairing of dams and sluiceways to a certain point on that waterway and its tributaries in order to facilitate the driving of logs and timber.⁶⁷ In some instances, a company will be given standard powers to a particular point on a river, and another company will be given similar powers exercisable from that point to a point further along the river.⁶⁸ In this way, rivers such as the Miramichi were divided to give jurisdiction, so to speak, to various companies along certain sections of its route.⁶⁹

Incorporation Acts, as a general rule, give the power to enter upon and occupy banks and surrounding lands in order to build dams, sluiceways and related structures and to make other improvements necessary for their stated purposes.⁷⁰ Most companies are also empowered to remove obstructions in rivers or branches which might interfere with the driving of logs, timber or other lumber.⁷¹ There is usually another provision empowering a company to enter upon, occupy, possess and enjoy, for the purposes expressed in the incorporation Act, private lands situated upon the principal waterway and its tributaries, as necessary for the purposes set forth in the Act.⁷² In these cases provision is made for compensation. Some Acts provide that nothing is to be construed as authorizing a company to interfere with or to obstruct the erection of a mill or mill dam or any work connected therewith upon the particular waterway or its tributaries.⁷³ As well, companies are generally held liable for all damages sustained through taking land necessary for their authorized purposes.⁷⁴

Another common provision prohibits the raising of the water level of lakes or rivers in such a manner as to injure land, trees, lumber or other things belonging to private parties, or to interfere with the rights of owners of lands or other property on or near lakes or rivers, or to affect any right of action of an owner for damage occasioned by the over-flowing of his property.⁷⁵

Companies are normally required by their incorporation Acts to keep driving dams, sluices and other works required on the river, its branches and tributaries in good repair.⁷⁶ In some Acts, as well, a company is by its servants and agents to take charge of logs and timber that may be put in the particular river, its tributaries and branches as soon as the owner of the logs and timber delivers to the secretary of the company a list of marks.⁷⁷ Also, as soon as the spring or autumn freshets supply sufficient water for driving activities, a company is to proceed and continue to drive the logs until they reach their destination within the limits of the company's jurisdiction.⁷⁸

67. See *e.g.* (1886), 49 Vict., c. 31, s. 5 (N.B.).

68. See *e.g.* (1881), 44 Vict., c. 69, s. 2 (N.B.).

69. See *e.g. ibid.*

70. See *e.g.* (1874), 37 Vict., c. 103, s. 2 (N.B.).

71. See *e.g.* (1886), 49 Vict., c. 31, s. 2 (N.B.).

72. See *e.g. ibid.* s. 3.

73. See *e.g.* (1886), 49 Vict., c. 31, s. 3 (N.B.).

74. See *e.g.* (1869), 32 Vict., c. 86, s. 2 (N.B.).

75. See *e.g.* (1876), 39 Vict., c. 63, s. 2 (N.B.).

76. See *e.g. ibid.*, s. 5

77. See *e.g. ibid.*, s. 12

78. See *e.g. ibid.*

Most Acts contain a provision stating that nothing in the Act is to be construed to prevent private parties or owners of logs from driving them or having them driven on the particular river or its branches, subject, however, to the tolls of dams, and the rules and regulations of the corporation made and provided in accordance with the provisions of the Act.⁷⁹

In some cases a river may be used by a boom company in addition to a log or stream driving company. In order to clarify the situation in these cases, the Act will specifically state that the river or stream driving company is not to interfere with the rights and privileges of the boom company using the particular river.⁸⁰

RIPARIAN RIGHTS

The most important statutory provision affecting the exercise of riparian rights (apart from statutes of general application authorizing uses of water that derogate from the exercise of these rights) is section 60 of the Crown Lands Act.⁸¹ A brief history of the section is essential. In 1884 it was enacted that in all future Crown grants a strip of land four rods (sixty-six feet) in width adjacent to the Nepisiguit River, Jacquet River, Upsalquitch River, Quatawamkedgwick River, Restigouche River, Charloe River, Patapedia River, Middle River, Little River, Tattagouche River, Big Tracadie River, Tabucintac River, Dungarvon River, Renous River, North West Miramichi River and branches, Kouchibouguac River, Kouchibouguacis River, Richibucto River, Green River and branches, Tobique River and branches, and such other rivers and lakes as may be declared by proclamation, together with the riparian ownership of these streams, would be reserved.⁸² A right of way to these rivers was, however, given to owners of land abutting the strip.⁸³ Amendments to the section provided that grants of islands could be made without reservation, though such grants must expressly reserve fishing privileges,⁸⁴ and that grants might be made without reservation where applications had been made before the enactment of the section.⁸⁵

In 1927, the strip was reserved from all rivers and lakes and increased to three chains (188 feet), and no right of way was reserved for abutting owners.⁸⁶ The Minister of Lands and Mines could, however, reduce the width of the strip or dispose of it entirely in sales of islands, lands of small extent or wherever he deemed it to be in the public interest to do so.⁸⁷ This was modified in the 1952 revision with the requirement that a grant of an island in a river would be subject to a reservation of contiguous fishing privileges,⁸⁸ and with the conferral of a right of way to owners of land abutting on the reserved strip.⁸⁹ In 1955 the section was amended further by substituting the word "stream" for the word

79. See *e.g.* (1886), 49 Vict., c. 31, s. 8 (N.B.).

80. See *e.g.* (1876), 38 Vict., c. 143, s. 10 (N.B.).

81. R.S.N.B., 1952, c. 53, s. 60, as amended by (1955), 4 Eliz. II, c. 42, ss. 1-2 (N.B.). [see also the Clean Environment Act, discussed in the Addendum, at pp. 494-5.].

82. (1884), 47 Vict., c. 7, s. 4 (N.B.).

83. *Ibid.*

84. (1887), 50 Vict., c. 7, s. 2 (N.B.).

85. (1890), 53 Vict., c. 17 (N.B.).

86. R.S.N.B., 1927, c. 30, s. 62.

87. *Ibid.*

88. *Ibid.*, s. 60(2).

89. *Ibid.*, s. 60(1).

"river" in the main subsection relating to the reservation;⁹⁰ this term is not defined in either the Act or the Interpretation Act.⁹¹ It is, perhaps, arguable that the word "stream" is less comprehensive than the word "river", which is defined in the Interpretation Act as including a creek, stream and brook,⁹² but, having regard to the progressive expansion of the Crown reservation over the years, it is difficult to see that the intention was to narrow the scope of the section. Ordinarily "stream" is probably a more comprehensive term than "river", and the amendment may have been enacted to clarify the scope of the provision.

The section was also amended in 1955 to require that all dispensements, or grants of reservations by the Minister (not merely islands), provided for under section 60(2), be subject to a reservation of fishing privileges in the contiguous waters.⁹³

Accordingly, with limited exceptions, private interests in lands abutting on the above named rivers, deriving from Crown grant after 1884, and private interests in lands abutting on any river or lake deriving from a Crown grant after 1927, are subject to riparian ownership being reserved to the Crown.⁹⁴

Apart from this section, which affects riparian rights generally, riparian rights are also affected by the statutes under the specific headings that follow.

FLOW AND LEVEL

Various provisions in New Brunswick public legislation authorize interferences with the flow and level of water in rivers, streams and lakes. Under the Highway Act,⁹⁵ for example, the Minister of Highways is empowered to take possession of land, water or a watercourse which is necessary for the construction, maintenance or repair of a highway or for obtaining better access thereto,⁹⁶ and may alter the course and level of a watercourse.⁹⁷ Compensation is provided for the owner of lands injuriously affected by the exercise of these powers.⁹⁸ Similar powers are vested in the Minister of Public Works under the Public Works Act,⁹⁹ with respect to the construction and maintenance of public works.¹⁰⁰

The damming and flooding of lands in the course of construction and operation of works for the generation of electric energy is authorized by the Electric Power Act.¹⁰¹ The New Brunswick Electric Power Commission is empowered to construct, maintain and operate works for generating electric energy from water-power and other means¹⁰² and to construct, maintain and operate dams, sluices, canals, raceways and other works upon, through, over, under, along and across

90. (1955), 4 Eliz. II, c. 42, s. 1 (N.B.).

91. R.S.N.B., 1952, c. 114.

92. *Ibid.*, s. 38(41).

93. (1955), 4 Eliz. II, c. 42, s. 2 (N.B.).

94. For a discussion of the section, see La Forest "Riparian Rights in New Brunswick" (1960), 3 Can. Bar Jo. 135, at pp. 142-3.

95. (1968), 17 Eliz. II, c. 5 (N.B.).

96. *Ibid.*, s. 21(b).

97. *Ibid.*, s. 21(e).

98. *Ibid.*, s. 22.

99. (1963), 12 Eliz. II, 2nd Sess., c. 10 (N.B.).

100. *Ibid.*, ss. 8(b),(e), (10(1)).

101. (1961-2), 10 & 11 Eliz. II, c. 41 (N.B.).

102. *Ibid.*, s. 24(1)(a).

public land, a public highway or public place, a stream, watercourse, bridge, viaduct or railway, and with or without the consent of the owner, to flood and overflow land and to do such acts as are necessary for storing water or for other purposes in connection with such works.¹⁰³ Where the exercise of these powers may obstruct the construction, improvement, maintenance or repair of public land, a public highway, public place, bridge, viaduct or railway, or its normal use, a report must be made to the Minister of Highways and his consent obtained.¹⁰⁴ Where the exercise of these powers might affect property, a report must be made to the Lieutenant-Governor in Council and his authorization obtained.¹⁰⁵ Compensation is provided for in the Act.¹⁰⁶

The flooding of land is further contemplated by companies authorized under the Stream Driving Companies Act¹⁰⁷ to engage in the business of transmitting timber downstream. The Act provides that where an owner of land flooded or interfered with in the course of such operation neglects or refuses to agree on the damages to be paid for the interference, an arbitration board is to be constituted to decide the amount of damages.¹⁰⁸

In the Mining Act,¹⁰⁹ it is provided that where a mine is located under or on the bed of a stream or lake, and it becomes necessary to divert the water of the stream, or drain the lake in order to work the minerals, the Lieutenant-Governor in Council may permit this to be done, subject to such regulations or alternative provisions for the benefit of any person entitled to the use of the water of the stream or lake in its natural state.¹¹⁰

Other statutes purport to regulate or set conditions on the right to divert the flow or alter the level of rivers, streams and lakes. Under the Waters Storage Act,¹¹¹ it is provided that no dam, boom or other work that has the effect of impounding, holding back or storing up water in a river, stream or lake shall be constructed until the plans and specifications have been approved by the Lieutenant-Governor in Council.¹¹² The Act further provides for situations where dams have been constructed before the passing of the Act, by directing that approval of their plans and specifications must be obtained if the river or stream passes under a highway bridge, railway bridge or railway culvert,¹¹³ further down its course, in default of which the dam must be removed.¹¹⁴ The Act does not apply, however, to driving dams on brooks and small streams or to reservoirs for the supply of water to municipalities.¹¹⁵

Further control is imposed by the Water Act,¹¹⁶ which provides that where a municipality or person contemplates a hydro-electric power project, a control dam,

103. *Ibid.*, s. 24(1)(b).

104. *Ibid.*, s. 24(3)(b), as enacted by (1970), 19 Eliz. II, c. 19, s. 9 (N.B.).

105. *Ibid.*, s. 24(3)(a).

106. *Ibid.*, ss. 28-32.

107. R.S.N.B., 1952, c. 219.

108. *Ibid.*, s. 22.

109. (1961-2), 10 & 11 Eliz. II, c. 45.

110. *Ibid.*, s. 101.

111. R.S.N.B., 1952, c. 248.

112. *Ibid.*, s. 1.

113. *Ibid.*, s. 3(1).

114. *Ibid.*, ss. 3(3), (4).

115. *Ibid.*, s. 5.

116. (1960-61), 9 & 10 Eliz. II, c. 19 (N.B.). [For the general control under the Clean Environment Act, see Addendum, pp. 494-5].

a river diversion, a drainage diversion, or any alteration of a lake or watercourse or of its waters, the plans and such other information as the authority may require shall be submitted to the Authority; any such undertaking is conditional on the approval of the Minister of Natural Resources,¹¹⁷ and upon the obtaining of a permit from the Authority,¹¹⁸ the fee for which is to be fixed by regulation.¹¹⁹ The intention, furthermore, seems to be that the provisions of the Water Act shall prevail over all other enactments of the legislature that may possibly conflict with it.¹²⁰

POLLUTION

A number of New Brunswick public statutes purport to provide a means for controlling the pollution of rivers, streams and lakes. The most important is the Water Act,¹²¹ which prohibits, without the joint approval of the Ministers of Natural Resources and Health and Welfare, the discharge or deposit by a person or municipality of material of any kind into a lake, river or stream or other water or watercourse, or upon its shore or bank, or in a place that might cause the pollution or impair the quality of such water for beneficial use.¹²² The Authority is further authorized to prescribe areas surrounding sources of public water supply, within which the discharge of material, as well as bathing, washing and similar activities, is prohibited.¹²³ The Authority is given control over pollution originating within the provincial jurisdiction,¹²⁴ and the Act provides that the Lieutenant-Governor in Council may make regulations necessary to carry out its provisions.¹²⁵ Under the regulations, municipalities and persons are forbidden to discharge solids either directly or indirectly into a lake, river, stream or other water, or on its bank or shore, without the consent of the Minister of Health and Welfare and the Minister of Natural Resources;¹²⁶ in addition, this latter Minister is empowered to order a municipality or person who discharges an effluent containing solids, to eliminate as great a portion of solids as in the Minister's opinion may be feasible.¹²⁷

Under the Mining Act¹²⁸, the Minister of Natural Resources is authorized, with the approval of the Lieutenant-Governor in Council, to make regulations respecting the disposal of tailings, slime, waste products or other noxious or deleterious substances upon lands or in waters.¹²⁹ Under the Health Act,¹³⁰ the Minister of Health and Welfare is empowered to make such regulations as he deems necessary for the prevention of the pollution, defilement, discolouration or

117. *Ibid.*, s. 12(1), as amended by (1966), 15 Eliz. II, c. 159, s. 5 (N.B.).

118. *Ibid.*, s. 12(2), as enacted by (1966), 15 Eliz. II, c. 159, s. 5 (N.B.).

119. *Ibid.*, s. 12(3), as enacted by (1966), 15 Eliz. II, c. 159, s. 5 (N.B.).

120. *Ibid.*, s. 6.

121. (1960-1), 9 & 10 Eliz. II, c. 19 (N.B.).

122. *Ibid.*, s. 10, as enacted by (1968), 17 Eliz. II, c. 58, s. 6 (N.B.). [Now the Ministers of Fisheries and Environment, and of Health; see Addendum p. 496. The Clean Environment Act now prohibits the deposit of waste into bodies of water, see Addendum, pp. 493-4.]

123. *Ibid.*, s. 11(2), as enacted by (1966), 15 Eliz. II, c. 159, s. 4 (N.B.).

124. *Ibid.*, s. 4(c).

125. *Ibid.*, s. 5(1).

126. SOR, 1963 Consolidation, Reg. 170, s. 2 (N.B.). [Now the Ministers of Fisheries and Environment, and of Health, see Addendum, p. 496.]

127. *Ibid.*, s. 3.

128. (1961-2), 10 & 11 Eliz. II, c. 45 (N.B.).

129. *Ibid.*, s. 27(1)(a).

130. R.S.N.B., 1952, c. 102.

fouling of lakes, rivers, streams and pools, and regulations relating to the inspection and approval of sources of water supply and the treatment of such sources by chemical or other means.¹³¹

And under the Weed Control Act,¹³² yet to be proclaimed, an owner or occupier of land must destroy all noxious weeds growing between the limit of his land and the low water mark of a river, stream, lake or other body of water that his land abuts;¹³³ an exception exists when the strip between the land and the low water mark is owned by a public utility or the Crown, in which case the latter bodies must assume responsibility for the control of noxious weeds.¹³⁴ Noxious weeds may be designated by regulation.¹³⁵

Relevant as well are the broad controls over sewage installations in the Health Act and the Water Act outlined more particularly in Chapter Three.

RIGHTS TO USE

Consumption

Under the Municipalities Act,¹³⁶ cities, towns and villages are empowered to provide services for the peace, order and good government of the municipality and for promoting the health, safety and welfare of inhabitants, including the supplying of water.¹³⁷ In this regard, municipalities are empowered to expropriate land for the purpose of providing services,¹³⁸ the power extending to lands outside the municipality which are not within the boundaries of another municipality.¹³⁹ These powers would seem to be broad enough to enable a municipality to expropriate the beds and banks of rivers, streams, lakes or ponds on private lands and to appropriate water for consumption purposes within the municipality. This would not appear to authorize the expropriation of waters on Crown lands (which are not referred to); there is no provision expressly binding the Crown, and this is required to affect Crown rights¹⁴⁰ in the absence of an implication to the contrary arising from the words of the statute.

It should also be noted that the expropriation of riparian land would not, under the common law rules discussed in Chapter Nine, permit a municipality to use water, in derogation of the rights of other riparian owners, for purposes unconnected with the land expropriated. Where water is to be used for municipal supply purposes, legislation authorizing the taking of water from a lake or stream would seem to be the only legal basis for such a program.

With regard to consumption generally, reference should be made to the more extensive coverage of the statutory basis for municipal water supply in

131. *Ibid.*, s. 6(1)(x).

132. (1969), 18 Eliz. II, c. 21 (N.B.).

133. *Ibid.*, s. 2(2).

134. *Ibid.*

135. *Ibid.*, ss. 1(c), 14(a).

136. (1966), 15 Eliz. II, c. 20 (N.B.).

137. *Ibid.*, s. 7(1), First Schedule (k). [For powers given to corporations created under the Water Act, see Addendum, p. 497].

138. *Ibid.*, s. 8(1).

139. *Ibid.*, ss. 8(1), (2). [See also the Tourism Development Act, discussed in the Addendum, at p. 497].

140. Interpretation Act, R.S.N.B., 1952, c. 114, s. 32.

Chapter Three. It should also be mentioned in passing that a number of private water companies have been established over the years with the object of supplying water for consumption purposes; most of them have since been taken over by municipal councils.¹⁴¹

Power Development

Under the Electric Power Act,¹⁴² discussed more fully in Chapter Three, the New Brunswick Electric Power Commission is empowered to construct and operate works for generating electric energy from water power and other means,¹⁴³ and in this regard to construct dams, sluices, canals, raceways and other works upon, through, over, under, along and across public property, streams and watercourses, to flood land without the consent of the owner, and to do such acts as are requisite for storing water.¹⁴⁴ The Commission is further authorized to take lands, waters and works capable of development for the provision of electric energy.¹⁴⁵ Interferences with public property and railways must be authorized by the Minister of Highways,¹⁴⁶ and compulsory interferences with other property must be authorized by the Lieutenant-Governor in Council.¹⁴⁷

While the bulk of electric power development in New Brunswick is effected by the New Brunswick Electric Power Commission, and the Electric Power Act is undoubtedly the most significant statute in this regard, it must be borne in mind that New Brunswick legislation has been replete with private Acts authorizing companies and other bodies to engage in the generation and distribution of electric energy in the province; these are too numerous to set out in the light of their overall relevance at this date. The wide power of expropriation granted to the Commission under section 24 would empower it to expropriate such private enterprises,¹⁴⁸ or to require such a body to supply to the Commission so much electric energy as it requests.¹⁴⁹ The Act also precludes, without the approval of the Lieutenant-Governor in Council, a private body supplying or selling power in any locality unless it was doing so on March 1, 1962.¹⁵⁰ A supplier who satisfies these requirements is, however, still controlled to a great extent by the Commission¹⁵¹. The Act further provides that no installation for generating electric power with a capacity of more than five hundred horsepower shall be made without the consent of the Lieutenant-Governor in Council.¹⁵²

Accordingly, while rights to employ water resources for the generation of electric energy do vest in bodies other than the Commission, especially in corporations generating power for their industrial uses, the most significant statutory powers, in this regard, are set out in the Electric Power Act.

141. The most recent example appears in *An Act Respecting the Town of Saint Andrews* (1969), 18 Eliz. II, c. 95 (N.B.), where authorization was given to the town to purchase the water supply system currently operated by the Canadian Pacific Railway.

142. (1961-2), 10 & 11 Eliz. II, c. 41 (N.B.).

143. *Ibid.*, s. 24(1)(a).

144. *Ibid.*, s. 24(1)(b).

145. *Ibid.*, s. 24(1)(c).

146. *Ibid.*, s. 24(3)(b), as enacted by (1970), 19 Eliz. II, c. 19, s. 9 (N.B.).

147. *Ibid.*, s. 24(3)(a).

148. *Ibid.*, s. 24(1)(c).

149. *Ibid.*, s. 24(1)(g).

150. *Ibid.*, s. 35(1).

151. *Ibid.*, s. 35.

152. *Ibid.*, s. 35(3).

Pulp, Paper and Lumber Companies

Pulp, paper and lumber companies exercise powers in relation to water resources either under private incorporating Acts or under legislation relating to existing letters patent companies. These companies are frequently given power to erect dams on specified rivers.¹⁵³ Usually, the interests of navigation and floating are protected by provisos that the free navigation of the river will not be interfered with.¹⁵⁴ The fisheries aspect of the resource is usually protected as well; companies exercising these powers are normally required to build fishways in their dams approved by the Lieutenant-Governor in Council.¹⁵⁵ In addition, where a company has, by reason of the erection of a dam, a surplus of water, some incorporating Acts specify that, subject to approval by the Lieutenant-Governor in Council, the company may lease, hire or sell any surplus power or water to any person, firm, town or village.¹⁵⁶ Some companies as well are explicitly empowered to maintain piers and booms, provided that they do not obstruct the navigation of boats or lumber.¹⁵⁷ Most incorporating Acts do not specify provisions relating to pollution control. However, in an Act relating to the Bathurst Lumber Company Limited,¹⁵⁸ it is set out that the company is not to allow sewage to pass into the Nepisiguit River or Bathurst Harbour. In another Act relating to Irving Pulp and Paper Limited¹⁵⁹ (and the same is true of other similar Acts), while there is no section dealing specifically with pollution, section 2 does state:

2. No action founded on nuisance shall lie against the company either by way of injunction or for damages for the doing without negligence of any act necessarily incidental to the exercise and enjoyment of the powers herein granted.

While this section would protect the company from claims arising out of pollution founded on nuisance, a riparian owner may base his action on injury to his property right, not on nuisance, and if he did so, he would probably succeed notwithstanding the section. It should also be noted that the company would, in any event, be subject to the overriding provisions of the Water Act¹⁶⁰ relating to pollution, as would all such companies.

Many companies, by Act of incorporation, are given general power to divert the flow of any river or stream when it is necessary or incidental to the purposes of

153. See, for example: New Brunswick Pulp and Paper Co. Ltd. (1899), 62 Vict., c. 91, s. 6 (Narrows of Tobique); Bathurst Lumber Co. Ltd. (1914), 4 Geo. V, c. 56, s. 4 (Nepisiguit River); Nashwaak Pulp and Paper Co. Ltd. (1919), 9 Geo. V, c. 109, s. 1 (Nashwaak River); Saint George Pulp and Paper Co. Ltd. (1934), 24 Geo. V, c. 47, s. 1 (outlets of McDougall Lake, Digdeguash Lake, Lake Utopia, Magaguadavic Lake). [For recent agreements, see Addendum, p. 497.].

154. See, for example: New Brunswick Pulp and Paper Co. Ltd. (1899), 62 Vict., c. 91, ss. 8, 9; Bathurst Lumber Co. Ltd. (1914), 4 Geo. V, c. 56, s. 4; Saint George Pulp and Paper Co. Ltd. (1934), 24 Geo. V, c. 47, ss. 1, 6.

155. See, for example: New Brunswick Pulp and Paper Co. Ltd. (1899), 62 Vict., c. 91, s. 12; Bathurst Lumber Co. Ltd., (1914), 4 Geo. V, c. 56, s. 4.

156. See, for example: New Brunswick Pulp and Paper Co. Ltd. (1899), 62 Vict., c. 91, s. 13; Lancaster Pulp and Paper Co. Ltd., (1900), 63 Vict., c. 72, s. 2.

157. See, for example: New Brunswick Pulp and Paper Co. Ltd. (1899), 62 Vict., c. 91, s. 7; Fraser Companies Ltd. (1929), 19 Geo. V, c. 67, s. 1.

158. (1914), 4 Geo. V, c. 56, s. 7 (N.B.).

159. (1951), 15 Geo. VI, c. 43, (N.B.); see also, Rothesay Paper Corp., (1959), 8 Eliz. II, c. 89, s. 11; MacMillan Rothesay Limited, (1970), 19 Eliz. II, c. 58, s. 5.

160. (1960-1), 9 & 10 Eliz. II, c. 19, s. 6 (N.B.).

each company set forth in its Act.¹⁶¹ As well, companies are frequently given the power to enter upon lands to make surveys and to expropriate where this is necessary to accomplish the purposes of the company.¹⁶² Other specified powers include power to generate electric energy,¹⁶³ and to enter into agreements with municipalities for the consumption of water.¹⁶⁴

In order to more fully examine these provisions and to determine the specific rivers on which pulp and paper companies are given rights, a perusal of each Act would be necessary. As a representative sampling, the Acts relating to the following pulp and paper companies, some of which continue to be operative today, might be examined:

- (1) Bathurst Company Ltd.;¹⁶⁵
- (2) Bathurst Lumber Co. Ltd.;¹⁶⁶
- (3) Bathurst Power and Paper Co. Ltd.;¹⁶⁷
- (4) Bathurst Power & Paper Co. Ltd.;¹⁶⁸
- (5) Bathurst Paper Limited—Les Papeteries Bathurst Limitée;¹⁶⁹
- (6) Dalhousie Lumber Co. Ltd.;¹⁷⁰
- (7) Fraser Companies Ltd.;¹⁷¹

161. See, for example: New Brunswick International Paper Co. Ltd. (1926), 16 Geo. V, c. 50, s. 7(2); Maritime Pulp and Paper Mills Corporation (1948), 12 Geo. VI, c. 61, s. 7(2); Irving Pulp and Paper Ltd. (1951), 15 Geo. VI, c. 43, s. 3(2); Rothesay Paper Corp. (1959), 8 Eliz. II, c. 89, s. 9(2); Bathurst Power & Paper Co. Ltd. (1961-2), 10 & 11 Eliz. II, c. 82, s. 3(2); South Nelson Forest Products Corp. (1961-2), 10 & 11 Eliz. II, c. 164, s. 7(2); MacMillan Rothesay Limited (1970), 19 Eliz. II, c. 58, s. 3(2).

162. See, for example: New Brunswick Pulp and Paper Co. Ltd., (1899), 62 Vict., c. 91, s. 5; Bathurst Lumber Co. Ltd. (1914), 4 Geo. V, c. 56, s. 4; Nashwaak Pulp and Paper Co. Ltd. (1919), 9 Geo. V, c. 109, s. 3; New Brunswick International Paper Co. (1926), 16 Geo. V, c. 50, s. 7(1); Maritime Pulp and Paper Mills Corp. (1948), 12 Geo. VI, c. 61, s. 7(1); Saint George Pulp and Paper Co. Ltd. (1934), 24 Geo. V, c. 47, s. 2; Fraser Companies Ltd. (1929), 19 Geo. V, c. 67, s. 2; Irving Pulp and Paper Ltd. (1951), 15 Geo. VI, c. 43, s. 3(1); Rothesay Paper Corp. (1959), 8 Eliz. II, c. 89, s. 9; South Nelson Forest Products Corp. (1961-2), 10 & 11 Eliz. II, c. 164, s. 7(1); MacMillan Rothesay Limited (1970), 19 Eliz. II, c. 58, s. 3(1).

163. See, for example: Rothesay Paper Corp. (1959), 8 Eliz. II, c. 89, s. 7(1) (d); Bathurst Power & Paper Co. Ltd. (1961-2), 10 & 11 Eliz. II, c. 82, s. 2(1)(d); South Nelson Forest Products Corp. (1961-2), 10 & 11 Eliz. II, c. 164, s. 6(1)(c); MacMillan Rothesay Limited (1970), 19 Eliz. II, c. 58, s. 1(d).

164. See, for example: Rothesay Paper Corp. (1959), 8 Eliz. II, c. 89, s. 15; MacMillan Rothesay Limited (1970), 19 Eliz. II, c. 58, s. 8.

165. (1927), 17 Geo. V, c. 75; (1928), 18 Geo. V, c. 58; (1949), 13 Geo. VI, c. 74.

166. (1914), Geo. V, c. 56.

167. (1928), 18 Geo. V, c. 58; (1949), 13 Geo. VI, c. 74.

168. (1961-2), 10 & 11 Eliz. II, c. 82.

169. (1966), 15 Eliz. II, c. 124 (vesting rights and powers of Bathurst Lumber Company Ltd., Bathurst Power and Paper Co. Ltd., Bathurst Company Ltd., Bathurst Power & Paper Co. Ltd., and subsidiaries under designated statutes, in Bathurst Paper Limited).

170. Incorporated by letters patent, March 11, 1903; see also (1903), 3 Edw. VII, c. 120.

171. (1929), 19 Geo. V, c. 67.

- (8) Inglewood Pulp and Paper Co. Ltd.;¹⁷²
- (9) Irving Pulp and Paper Ltd.;¹⁷³
- (10) Lancaster Pulp and Paper Co. Ltd.;¹⁷⁴
- (11) MacMillan Rothesay Limited;¹⁷⁵
- (12) Maritime Pulp and Paper Mills Corporation;¹⁷⁶
- (13) Miramichi Pulp and Paper Co. Ltd.;¹⁷⁷
- (14) Nashwaak Pulp and Paper Co. Ltd.;¹⁷⁸
- (15) New Brunswick International Paper Co.;¹⁷⁹
- (16) New Brunswick Pulp and Paper Co.;¹⁸⁰
- (17) Rothesay Paper Corporation;¹⁸¹
- (18) Saint George Pulp and Paper Co. Ltd.;¹⁸²
- (19) South Nelson Forest Products Corp.¹⁸³

Other Industrial Uses

It is commonplace for statutory powers affecting water resources to be granted to corporations for general industrial uses. These may be conferred directly in the Act incorporating the corporation where the corporation is a statutory body, or by special Act upon a corporation previously incorporated by letters patent.

It is not practicable to give a comprehensive statement of all relevant powers exercisable by all corporations within the province, but it is possible to give a representative picture of various powers by referring to a number of fairly recent statutes affecting such industrial concerns as Irving Refining Ltd., Brunswick Mining & Smelting Corporation Ltd., East Coast Smelting & Chemical Co. Ltd., Bay Steel Corporation and Bathurst Marine Ltd.

172. (1901), 1 Edw. VII, c. 80.

173. (1951), 15 Geo. VI, c. 43; (1953), 2 Eliz. II, c. 35.

174. (1900), 63 Vict., c. 72.

175. (1970), 19 Eliz. II, c. 58.

176. (1948), 12 Geo. VI, c. 61.

177. Incorporated by letters patent, Jan. 4, 1905; see also (1905), 5 Edw. VII, c. 89.

178. (1919), 9 Geo. V, c. 109.

179. (1926), 16 Geo. V, c. 50; (1927), 17 Geo. V, c. 73; (1931), 21 Geo. V, c. 61; (1948), 12 Geo. VI, c. 132; (1949), 13 Geo. VI, c. 85; (1950), 14 Geo. VI, c. 80; (1959), 8 Eliz. II, c. 114.

180. (1899), 62 Vict., c. 91,

181. (1959), 8 Eliz. II, c. 89.

182. Incorporated by letters patent, Dec. 12, 1933; see also (1934), 24 Geo. V, c. 47; (1960-1), 9 & 10 Eliz. II, c. 147.

183. (1961-2), 10 & 11 Eliz. II, c. 164.

Among the powers commonly exercised by such corporations is the power to construct docks and breakwaters,¹⁸⁴ booms, dams, storage dams, reservoirs, storage and water flowage and other river, lake and sea improvements, aqueducts, bridges, water courses and other works pertaining to the objects of the company.¹⁸⁵ In addition, power is frequently given to develop, produce, manufacture or generate electric power or energy and sell and distribute it,¹⁸⁶ subject to the provisions of the Electric Power Act. Further powers permit entry upon and expropriation of private lands, privileges, easements, servitudes, rights and interests in and appertaining to lands, including riparian rights, which the company deems necessary for its purposes.¹⁸⁷ Subject to the Water Act, a company may, without the consent of interested parties, divert the flow of a watercourse,¹⁸⁸ and enter upon land to make surveys and obtain data for that purpose.¹⁸⁹ Provision is made for compensating persons for land expropriated or injuriously affected by water diversion, including damages arising from the diminution or loss of flow of water used for industrial or power purposes.¹⁹⁰

Another common provision requires the consent of the Attorney-General as a pre-requisite to an action in nuisance against such corporations.¹⁹¹

184. See, for example: Brunswick Mining and Smelting Corp. Ltd. (1961-2), 10 & 11 Eliz. II, c. 83, s. 1(c); East Coast Smelting and Chemical Company Ltd. (1961-2), 10 & 11 Eliz. II, c. 98, s. 1(c); Bathurst Marine Ltd. (1961-2), 10 & 11 Eliz. II, c. 80, s. 2(1)(a); Bay Steel Corp. (1965), 14 Eliz. II, c. 54, s. 7(1)(c).

185. See, for example: Brunswick Mining and Smelting Corp. Ltd. (1961-2), 10 & 11 Eliz. II, c. 83, s. 1(d); East Coast Smelting and Chemical Company Ltd. (1961-2), 10 & 11 Eliz. II, c. 98, s. 1(d); Bathurst Marine Ltd. (1961-2), 10 & 11 Eliz. II, c. 80, s. 2(1)(b); Bay Steel Corp. (1965), 14 Eliz. II, c. 54, s. 7(1)(d).

186. See, for example: Brunswick Mining and Smelting Corp. Ltd. (1961-2), 10 & 11 Eliz. II, c. 83, s. 1(f); East Coast Smelting and Chemical Company Ltd. (1961-2), 10 & 11 Eliz. II, c. 98, s. 1(f); Bathurst Marine Ltd. (1961-2), 10 & 11 Eliz. II, c. 80, s. 2(1)(d); Bay Steel Corp. (1965), 14 Eliz. II, c. 54, s. 7(1)(f); Irving Refining Limited (1958), 7 Eliz. II, c. 72, s. 5.

187. See, for example: Brunswick Mining and Smelting Corp. Ltd. (1961-2), 10 & 11 Eliz. II, c. 83, s. 2(1); East Coast Smelting and Chemical Company Ltd. (1961-2), 10 & 11 Eliz. II, c. 98, s. 2(1); Bathurst Marine Ltd. (1961-2), 10 & 11 Eliz. II, c. 80, s. 3(1); Bay Steel Corp. (1965), 14 Eliz. II, c. 54, s. 8(1).

188. See, for example: Brunswick Mining and Smelting Corp. Ltd. (1961-2), 10 & 11 Eliz. II, c. 83, s. 2(2); East Coast Smelting and Chemical Company Ltd. (1961-2), 10 & 11 Eliz. II, c. 98, s. 2(2); Bathurst Marine Ltd. (1961-2), 10 & 11 Eliz. II, c. 80, s. 3(2); Bay Steel Corp. (1965), 14 Eliz. II, c. 54, s. 8(2).

189. Brunswick Mining and Smelting Corp. Ltd. (1961-2), 10 & 11 Eliz. II, c. 83, s. 2(3); East Coast Smelting and Chemical Company Ltd. (1961-2), 10 & 11 Eliz. II, c. 98, s. 2(3); Bathurst Marine Ltd. (1961-2), 10 & 11 Eliz. II, c. 80, s. 3(3); Bay Steel Corp. (1965), 14 Eliz. II, c. 54, s. 8(3).

190. Brunswick Mining and Smelting Corp. Ltd. (1961-2), 10 & 11 Eliz. II, c. 83, s. 2(10); East Coast Smelting and Chemical Company Ltd. (1961-2), 10 & 11 Eliz. II, c. 98, s. 2(10); Bathurst Marine Ltd. (1961-2), 10 & 11 Eliz. II, c. 80, s. 3(10); Bay Steel Corp. (1965), 14 Eliz. II, c. 54, s. 8(10).

191. See, for example: Brunswick Mining and Smelting Corp. Ltd. (1961-2), 10 & 11 Eliz. II, c. 83, s. 4; East Coast Smelting and Chemical Company Ltd. (1961-2), 10 & 11 Eliz. II, c. 98, s. 4; Bathurst Marine Ltd. (1961-2), 10 & 11 Eliz. II, c. 80, s. 5; Bay Steel Corp. (1965), 14 Eliz. II, c. 54, s. 10.

Apart from these general powers frequently accorded New Brunswick corporations, special powers are sometimes conferred by the legislature. An example is the case of Irving Refining Limited, where an agreement between the company, the Simonds Sewerage Board and the Simonds Highway Board was confirmed by special Act.¹⁹² By virtue of this the company was authorized to erect dams in the Little River Watershed in the Parish of Simonds and on any ponds, lakes or streams in the parish outside the Loch Lomond watershed (which includes the Mispic River and the Black River watersheds) and to take the water for the industrial purposes of the company.¹⁹³ The company was further empowered to acquire lands or interests in real estate for creating lakes and storage reservoirs, to lay down pipes and conductors of water for carrying it to and from its refinery, and, generally, to exercise the rights and powers within the Little River watershed granted to it by the City of Saint John.¹⁹⁴ Development of a water supply outside the Little River watershed was to be dependent on the consent of the city, and such consent was not to be unreasonably withheld.¹⁹⁵

Further special legislative powers were given to the same company in respect of the Courtenay Bay Causeway in the County of Saint John.¹⁹⁶ Legislation confirmed an agreement between the Municipality of the County of Saint John, the City of Saint John, Irving Refining Limited, the Simonds Sewerage Board, and the Simonds Highway Board, and conferred powers on the company to construct a causeway across Courtenay Bay and to divert the Marsh Creek through the causeway.¹⁹⁷ Powers of expropriation were given to the Municipality of the County of Saint John in respect of lands and riparian rights required for the completion of the project.¹⁹⁸

These cases are intended only as examples of the types of powers commonly conferred by the legislature for industrial uses, but they serve to illustrate that where a specific use of water is contemplated which may conceivably be interfered with or may interfere with an existing industrial use, close scrutiny of the statutory powers of the corporation must be made. And, in this regard, such general considerations as are raised in Chapter Twenty must be taken into account as well.

RIGHTS RESPECTING THE BED

The most significant statutory provision relating to the ownership of the bed is again section 60 of the Crown Lands Act, discussed earlier.¹⁹⁹ To the extent

192. (1958), 7 Eliz. II, c. 72 (N.B.).

193. *Ibid.*, s. 3(1).

194. *Ibid.*

195. *Ibid.*, s. 3(2). It may be withheld if the city is prepared to supply the company's requirements: s. 3(3).

196. (1959), 8 Eliz. II, c. 146. See also (1960), 9 Eliz. II, c. 161 (National Harbours Board land acquired).

197. *Ibid.*, s. 5.

198. *Ibid.*, s. 7.

199. See pp. 277-8.

that the riparian ownership is reserved to the Crown by this section, private ownership of the bed will be precluded.

Mention should also be made of the Oyster Fisheries Act,²⁰⁰ which is discussed, however, in relation to coastal waters.

200. R.S.N.B., 1952, c. 165, discussed in Chapter Twenty three.

CHAPTER THIRTEEN

Prince Edward Island Statutes Respecting Rivers, Streams and Lakes

By Alan D. Reid

GENERAL

Like New Brunswick, and unlike Newfoundland and Nova Scotia, there is no legislation in Prince Edward Island declaring Crown ownership of provincial waters. General common law rules respecting rights of use and ownership continue to apply, subject to the restrictions as to use outlined under the headings that follow.

FLOW AND LEVEL

Among the public Acts of Prince Edward Island that purport to affect the flow and level of riparian waters is the Public Works Act,¹ which authorizes the Minister of Public Works to take possession of streams, waters and watercourses, the expropriation of which is in his judgment necessary for the use, construction, maintenance or repair of a public work, or for obtaining better access to it,² and to alter the course or level of rivers, canals, streams or other watercourses.³ Similar powers are extended by the Expropriation Act⁴ to any Minister presiding over a government department charged with or having the supervision, management or control of the construction, maintenance or repair of a public work.⁵ Broad powers of obstruction, diversion and flooding exist as well under the Power Commission Act as discussed below.

These powers to flood and divert are probably subject, however, to the over-riding control of the Prince Edward Island Water Authority. The Water Authority Act⁶ purports to vest in the Authority the control of the alteration of the natural features of any watercourse or lake and the natural movement of water therein,⁷ and provides that the Act is to prevail over every other Act of the legislature.⁸ The extent to which these provisions might be employed to permit the Authority to restrict the exercise of a statutory power elsewhere conferred is a matter of some question; unfortunately, the manner in which the Authority may exercise its control, apart from making regulations,⁹ is not articulated in the Act.¹⁰

1. (1956), 5 Eliz. II, c. 32 (P.E.I.).

2. *Ibid.*, s. 10(b).

3. *Ibid.*, s. 10(e).

4. R.S.P.E.I., 1951, c. 53.

5. *Ibid.*, ss. 1(b), 2(b), (e).

6. (1965), 14 Eliz. II, c. 19 (P.E.I.) [This Act has now been repealed and replaced by the Environmental Control Commission Act; see Addendum, pp. 498-502.].

7. *Ibid.*, s. 14(d).

8. *Ibid.*, s. 15.

9. *Ibid.*, s. 18.

10. See, generally, the brief discussion of the "control" question in the discussion of New Brunswick and P.E.I. statutes affecting surface and ground water in Chapter Twenty-one.

POLLUTION

Overriding pollution control is conferred on the Prince Edward Island Water Authority by the Water Authority Act.¹¹ The Authority is given control over pollution originating within the jurisdiction of the province¹² and is empowered to make regulations pertaining to all operations involving the pollution of water.¹³ It may be granted, by regulation of the Lieutenant-Governor in Council, the right to exercise any power pertaining to pollution which is conferred by law on a Minister or officer of the Crown,¹⁴ and may enter any premises, plant or other establishment to take samples of water or sewage for analysis.¹⁵ The Act further provides that without approval from the Authority, no municipality or person shall discharge or deposit any material of any kind into any lake, river, pond, stream or other water or watercourse, or upon any shore or bank or into any place that may cause pollution or impair the quality of water for beneficial use.¹⁶

A number of other public Acts relate to the pollution of rivers, streams and lakes. Under the Public Health Act,¹⁷ the Lieutenant-Governor in Council is empowered to make regulations to prohibit the pollution, defilement, discolouration or fouling of lakes, streams, pools and other waters.¹⁸ A provision of the Fish and Game Protection Act¹⁹ prohibits the contamination of inland waters of the province that are frequented by trout or salmon.²⁰ Provision is also made in the Town Act²¹ for towns to pass by-laws prohibiting the waste and fouling of water.²²

A number of Acts contain provisions designed to control the unwarranted disposal of sewage. Under the Water and Sewerage Act,²³ every public utility, which includes any person, association, corporation, partnership or municipality providing water or sewage services for the public,²⁴ must obtain the approval of the Public Utilities Commission for its proposed works.²⁵ In addition, the Public Health Act²⁶ prescribes that the Lieutenant-Governor in Council must approve the construction, alteration or extension of common sewers and sewage systems installed by municipal councils or persons, unless authorized by statute,²⁷ and

11. (1965), 14 Eliz. II, c. 19 (P.E.I.). [See now Environmental Control Commission Act; see Addendum, pp. 498-502. Another new Act concerning pollution is the Agricultural Chemicals Act; see Addendum, pp. 502-3.].

12. *Ibid.*, s. 14(c).

13. *Ibid.*, s. 18.

14. *Ibid.*, s. 20.

15. *Ibid.*, s. 16(1). [See now in addition to the Environmental Control Commission Act, the Agricultural Chemicals Act in Addendum, at pp. 502-3.].

16. *Ibid.*, s. 17.

17. R.S.P.E.I., 1951, c. 129.

18. *Ibid.*, s. 5(14).

19. (1959), 8 Eliz. II, c. 13 (P.E.I.).

20. *Ibid.*, s. 36.

21. R.S.P.E.I., 1951, c. 162.

22. *Ibid.*, s. 78(63).

23. (1960), 9 Eliz. II, c. 47 (P.E.I.).

24. *Ibid.*, ss. 1C, 1B.

25. *Ibid.*, s. 3.

26. R.S.P.E.I., 1951, c. 129.

27. *Ibid.*, s. 14.

may order alterations in any existing or proposed system.²⁸ The approval of the Prince Edward Island Water Authority must also be obtained under the Water Authority Act.²⁹

A basis for compensating persons suffering damage from industrial pollution, and for pre-determining the limits of liability for pollution by an industrial concern is provided in the Factories Act.³⁰ Where a person is desirous of operating a factory in a place other than in a city, and where refuse from the factory may pollute or damage the water of any stream into which it is emptied, or may affect the property adjoining the factory, he may give notice as prescribed in the Act of his intention to operate a factory in a proposed site and request objections to be filed.³¹ "Factory" is defined as any building and machinery used in the manufacture of starch, sugar, cottons, woollens, clothing, boots and shoes, or in the trade or business of workers of wood, iron or tin, hay presses, grist, saw or carding mills operated by steam or water power, establishments for preserving lobsters or other fish or meats, or used and employed by workers in iron or tin and fanners, whether operated by steam or water power or not.³² Persons whose property might be affected are given one month to file objections³³ (with limited exceptions in favour of persons outside the province or under disability, who are given two months from the date of return, or date of removal of the disability up to a limit of two years from the date of an order given under the Act).³⁴ The matter is resolved by application to the Supreme Court or a judge thereof for arbitration.³⁵ An order of a judge stands as a defence with respect to any legal action which might have been maintained against the applicant for operating the factory if no application and order had been made under the Act.³⁶

The right to operate a factory is considered as an incorporeal hereditament appurtenant to the land and passes with the land;³⁷ however, a factory which has not been operated for a period of five years may be deprived of this right, upon application to the Supreme Court.³⁸ The Act expressly states, in addition, that nothing therein is to be deemed as conflicting with any right of the Dominion relating to fisheries.³⁹

Finally, under the regulations pursuant to the Oil, Natural Gas and Minerals Act,⁴⁰ licensees and lessees are required to make reasonable provision for the disposal of waste and refuse so as to avoid any inconvenience, nuisance or obstruc-

28. *Ibid.*, s. 15.

29. (1965), 14 Eliz. II, c. 19, s. 27(1), (P.E.I.). [See now Environmental Control Commission Act; see Addendum, p. 501.].

30. R.S.P.E.I., 1951, c. 54.

31. *Ibid.*, s. 2.

32. *Ibid.*, s. 1(a).

33. *Ibid.*, s. 3.

34. *Ibid.*, s. 7.

35. *Ibid.*, s. 4.

36. *Ibid.*, s. 6.

37. *Ibid.*, s. 10.

38. *Ibid.*, s. 13.

39. *Ibid.*, s. 14.

40. (1957), 6 Eliz. II, c. 24 (P.E.I.). [This Act has been repealed and re-enacted; see Addendum, p. 504.].

tion to any lake, river, stream or other body of water,⁴¹ and are further required to take all reasonable care to prevent the escape of salt water into lakes, rivers and streams.⁴²

POWER DEVELOPMENT

Under the Power Commission Act,⁴³ the Prince Edward Island Power Commission, upon authorization by the Lieutenant-Governor in Council, may develop power sites, power projects and power plants⁴⁴ (which include all land, water and rights to use water, lakes, rivers, streams, watercourses, water licences, reservoirs, dams, water storage, sluices, canals, raceways, tunnels and aqueducts used for the generation of power),⁴⁵ flood and overflow land, accumulate and store water, alter the level of rivers, lakes, streams and other bodies of water⁴⁶ and may acquire, in accordance with statute, the right to enter upon rivers, streams and other waterways to erect anything required for the generation of power.⁴⁷ Insofar as private rights are affected, the Act empowers the Lieutenant-Governor in Council to authorize the Commission to expropriate, under specific terms, property interests essential to the attainment of the objectives set out in the Act.⁴⁸

The functions of the Commission are more fully discussed in Chapter Four.

RIGHTS RESPECTING THE BED

To encourage commercial enterprise, the Prince Edward Island Legislature, in 1862, authorized the Lieutenant-Governor in Council to grant parts of the hitherto ungranted shore or bed of any bay, river or inland water of the Island to any corporation, public company or private person in any estate or for any term, subject to whatever restrictions the Lieutenant-Governor in Council deemed just and reasonable.⁴⁹ Such grants, however, were conditional upon the consent of the owners of land in front of, or abutting the shore.⁵⁰

Further legislation was passed in 1871⁵¹ to enable the grantee of the shore or bed of any bay, river or inland water held under Crown grant and described in such grant as having the channel of the bay as a boundary, to apply to the Lieutenant-Governor in Council to have the position of the channel defined.⁵² The Lieutenant-Governor in Council was then required to direct that a survey be made,⁵³ to be paid for by the applicant.⁵⁴ The Act went on to specify that the word "shore", in all Crown grants of water lots in Charlottetown, Georgetown, Princetown and Summerside, and in all grants of the shore or bed of any bay,

41. Reg. made May 12, 1958, s. 46(1).

42. *Ibid.*, s. 46(2).

43. R.S.P.E.I., 1951, c. 117.

44. *Ibid.*, s. 2(d).

45. *Ibid.*, ss. 1(f), (g), (h).

46. *Ibid.*, s. 2(g).

47. *Ibid.*, s. 2(i).

48. *Ibid.*, s. 4, Part Seven.

49. (1862), 25 Vict., c. 19, s. 1 (P.E.I.).

50. *Ibid.*, ss. 2, 3.

51. (1871), 34 Vict., c. 17 (P.E.I.).

52. *Ibid.*, s. 1.

53. *Ibid.*, s. 2.

54. *Ibid.*, s. 3.

river or inland water made under the 1862 Act shall be taken to include all that portion of the shore and bed of the water extending from the channel to ordinary high water mark,⁵⁵ and that the word "shores" in that Act shall be taken to include all that portion of the shore and bed of any river, bay or inland water of Prince Edward Island lying between the channel and ordinary high water mark.⁵⁶

Mention should also be made of the oyster fisheries legislation, which is discussed in Chapter Twenty Three.

55. *Ibid.*, s. 5.

56. *Ibid.*, s. 6. This Act has not been repealed.

CHAPTER FOURTEEN

Nova Scotia Statutes Respecting Rivers, Streams and Lakes*

GENERAL

The common law relating to watercourses is fundamentally altered in so far as it falls within the jurisdiction of Nova Scotia by section 2 of the Water Act.¹ That section vests in the province every watercourse and the sole and exclusive right to use, divert and appropriate all water at any time in any watercourse and deems this to have been done since May 16, 1919; every watercourse is freed, discharged and released from every fishery, right to take fish, easement, *profit à prendre* and from every estate, interest, claim, right and privilege whatsoever since that day. The section makes it clear that this is so notwithstanding any law of Nova Scotia, whether statutory or otherwise, or any grant, deed or transfer *heretofore made*, whether by the Crown or otherwise, or any possession, occupation, use or obstruction of any watercourse or any use of water by any person for any time whatever.²

The words "heretofore made" would appear to relate to statutes and other laws as well as to grants, deeds and transfers. Consequently the Act leaves untouched rights granted by the Crown or by statute since the passing of the Act, but whether the reference to statutes "heretofore made" would be read as relating to Acts passed before the latest revision of the Water Act or the original Act of 1919 is not entirely clear. However, judging from the structure of section 2 and the fact that it seems inconceivable that the legislature would in a revision intend to repeal statutes passed by it in the face of the predecessors of the present Water Act, it appears to relate to Acts passed before May 16, 1919.

The breadth of the provision of the Water Act vesting waters and watercourses in the Crown is underlined by the definition of a watercourse, which includes every watercourse and the bed thereof and every source of water supply, whether it usually contains water or not, and every stream, river, lake, pond, creek, spring, ravine and gulch; only small rivulets or brooks unsuitable for milling, mechanical or power purposes are excepted.³

The use by any person of watercourses, as so defined, and the waters therein is left to be determined by the Minister appointed under the Water Act. He may, under section 3, authorize any person to use them for such purposes and on such terms and conditions, including, in his discretion, the payment of compensation to any person whose rights may be detrimentally affected. This gives the Minister a very broad control over the water resources of the province. But any authoriza-

* The original research for this chapter was prepared by a team under W. A. Mackay and was revised by Gerard V. La Forest and Lucille Kerr.

1. R.S.N.S., 1967, c. 335.

2. *Ibid.*, s. 2; see also s. 4.

3. *Ibid.*, s. 1(k).

tion by the Minister under this section must be construed subject to the Public Health Act.⁴ A list of authorizations appears in the Appendix to this chapter.

It is obvious from the foregoing that much of the common law relating to riparian rights and the ownership of the bed of watercourses is now obsolete, though, of course, matters falling within federal competence such as navigation and the regulation of fisheries are not altered. The details will be examined under the headings that follow.

There are a number of private Acts giving powers of maintenance, management, control or protection of certain watercourses to various municipalities. These include an Act giving rights to the Commissioners of Streets of the Town of Windsor respecting Cunnabell's Creek,⁵ one giving the Town of Liverpool rights respecting Meadow Pond,⁶ and one giving the Town of Truro rights respecting Dogget's Brook.⁷ Whether the Act respecting Cunnabell's Creek is still in force appears to depend on the physical characteristics of the creek. Section 2 of the Water Act would appear to override the Act, unless the creek falls within the exclusion of "small rivulets or brooks unsuitable for milling, mechanical or power purposes". This exclusion does not, however, cover ponds, so the Act respecting Meadow Brook would appear to be overridden. The Act respecting Dogget's Brook, having been passed since 1919, is, however, probably still effective.

NAVIGATION

Navigation is a federal matter,⁸ but some of the provincial statutes are relevant. The Angling Act confers on residents of the province the right to go on any river, stream or lake in a boat or a canoe or in any other manner for the purpose of fishing with a rod or line.⁹ Under the Municipal Act,¹⁰ municipalities may borrow to establish and operate ferries, and under the Ferries Act¹¹ they are empowered to establish these ferries over harbours, bays, rivers and creeks within the municipality.

Power to restrict navigation on some provincial waters is also granted by statute. Thus municipalities are empowered to make by-laws prohibiting the driving of motor boats at speeds in excess of those prescribed¹² as is the Minister of Lands and Forests in exercise of his power to make regulations respecting the use of water craft within a provincial park.¹³ The constitutional problems raised by such provisions are discussed in Chapter One.

4. *Ibid.*, s. 3(4).

5. (1869), 32 Vict., c. 41 (N.S.).

6. (1910), 10 Edw. VII, c. 82 (N.S.).

7. (1920), 10 & 11 Geo. V, c. 140 (N.S.).

8. See Chapter One.

9. R.S.N.S., 1967, c. 9, s. 2(2).

10. R.S.N.S., 1967, c. 192, s. 136(10).

11. R.S.N.S., 1967, c. 105, s. 1.

12. R.S.N.S., 1967, c. 192, s. 191(54).

13. R.S.N.S., 1967, c. 244, s. 12(1)(m).

FLOATING

A public right to float logs has long existed by statute in Nova Scotia,¹⁴ but the statute granting the right was expressly repealed by the Water Act of 1919.¹⁵ Replacing this general right of floating is a procedure in section 3 of the Water Act whereby persons may be authorized by the Minister appointed under the Act to use watercourses for such purposes and on such terms and conditions as are deemed proper, including terms that the person so authorized shall compensate any person whose rights may be injuriously affected.¹⁶ When a person is authorized to use a watercourse for the purpose of floating or transmitting logs, timber, lumber, wood or other articles, he and his agents are entitled to have a reasonable use of and access to the banks of the watercourse during the floating or transmission, and to enter upon the banks and lands adjoining the watercourse for the purpose of removing such logs, timber or other articles that have become caught there.¹⁷ Such persons are liable only for actual damages caused by the floating, transmission or removal.¹⁸ Since the enactment of the Water Act many authorizations to use provincial waters for purposes of floating logs or "stream driving" have been made, but most have expired. It would appear that the remaining ones will not be renewed by the Minister when their expiry date is reached.¹⁹ The existing authorizations are listed in the Appendix to this chapter.

Powers over water and watercourses, complementary to those in the Water Act, are granted under the Lands and Forests Act and the Power Commission Act. Under the Lands and Forests Act, the Lieutenant-Governor in Council, while unable to give permission to float timber, may authorize the leasing of the privilege to place dams, sluices or other works on any stream for the purpose of floating timber.²⁰ In practice this privilege is given in each order in council or authorization granted under section 3(1) of the Water Act giving authority to float logs or timber.

Similarly, under the Power Commission Act, the Power Commission is empowered to use any watercourse which in its opinion is capable of improvement or development for the purpose of facilitating the floating of timber and for the purpose of constructing such works and structures as are deemed necessary.²¹ However, this power would appear to be subject to the Water Act which vests all relevant watercourses in the Crown. In any event, in practice when the Commission wishes to use a watercourse, it seeks the authorization of the Minister under section 3(1) of the Water Act. As in other cases the authorization must be read subject to the Public Health Act.²²

There are also provisions in the Municipal Act relating to the floating of timber. Under this Act municipal councils are empowered to make by-laws

14. Of the Conveying of Timber and Lumber on Rivers and the Removal of Obstructions therefrom, R.S.N.S., 1900, c. 95. This statute is found in the Revised Statutes of Nova Scotia of 1851.

15. (1919), 9 & 10 Geo. V, c. 5 (N.S.).

16. R.S.N.S., 1967, c. 335, as amended by (1968), 17 Eliz. II, c. 64, s. 3(1) (N.S.).

17. *Ibid.*, s. 3(2).

18. *Ibid.*

19. This information was disclosed at a confidential interview with a responsible civil servant. The interest protected by this policy is water conservation.

20. R.S.N.S., 1967, c. 163, s. 34.

21. R.S.N.S., 1967, c. 233, s. 22(3)(b).

22. Water Act, R.S.N.S., 1967, c. 335, s. 3(4).

regulating the construction and management of booms for holding timber, logs and other lumber, the driving of logs, the fixing of tolls for the driving of logs, the disposition of lumber belonging to persons who do not pay tolls,²³ and the operation and time of opening sluices.²⁴ These by-laws, it will be noted, do not grant the right to float timber; they merely regulate it.

Finally, in addition to the public statutes already discussed, there are several private statutes granting rights to float and to build structures for facilitating floating to specified persons and corporations. But these statutes, having been enacted before the original Water Act in 1919,²⁵ would appear no longer to have effect (even if not otherwise spent) in view of the fact that section 2 of the Water Act vests watercourses and uses of their waters in the province notwithstanding any law, whether statutory or otherwise heretofore made.

FISHING

The Angling Act gives a right to fish with rod and line in provincial rivers, streams and lakes to the public in Nova Scotia.²⁶ In exercising the right a person is entitled to cross by foot any uncultivated land no matter by whom it is owned, though he is liable for any damage he may cause on such lands. The Water Act makes it clear that the Minister may not grant any private fishing right or privilege.²⁷

Reference may also be made to section 209 of the Lands and Forests Act providing for rearing ponds and protected fishing areas.²⁸

Finally, the Oyster Fisheries Act permits the granting of leases along foreshores, harbours, bays and rivers.²⁹ The Act, and other Acts relating to coastal fisheries, is discussed in Chapter Twenty Three.

RIPARIAN RIGHTS

As already mentioned, riparian rights are substantially altered by the provision of the Water Act vesting, with minor exceptions, all watercourses, the waters therein and rights thereto in the province. The details will be discussed in dealing with the particularized headings that follow.

RIGHT OF ACCESS

A riparian owner's right of access to his waters is not expressly referred to or restricted in the Nova Scotia statutes. However, the Angling Act, the Water Act, the Municipal Act, the Wharves and Public Landings Act and the Private Ways Act give a right of access to persons other than a riparian owner.

23. R.S.N.S., 1967, c. 192, s. 191(26).

24. *Ibid.*, s. 191(27).

25. (1874), 37 Vict., c. 81; (1875), 38 Vict., cc. 89, 90 (see also (1895), 58 Vict., c. 141), cc. 91, 92; (1890), 53 Vict., c. 167; (1896), 59 Vict., c. 101; (1897), 60 Vict., c. 100; (1901), 1 Edw. VII, c. 132; (1902), 2 Edw. VII, c. 138; see *Miller and Thompson v. Halifax Power Co.* (1913), 47 N.S.R. 334; *Thompson v. Halifax Power Co.* (1914), 47 N.S.R. 536; *Cook v. Davison Lumber and Manufacturing Co.* (1925), 58 N.S.R. 237.

26. R.S.N.S., 1967, c. 9, s. 2(2).

27. R.S.N.S., 1967, c. 335, s. 3(3).

28. R.S.N.S., c. 163, s. 209. The section is discussed at p. 142.

29. R.S.N.S., 1968, c. 220.

The Angling Act, discussed in more detail in relation to fishing, gives a resident of the province a right to go over uncultivated lands to get to rivers, streams and lakes for the purpose of fishing.³⁰ The Water Act allows persons authorized to use watercourses for floating timber reasonable access to the banks of such watercourses to facilitate floating and to remove logs and timber which have become caught there.³¹ It is possible that a large scale logging operation might temporarily restrict the riparian owner's right of access. The Municipal Act empowers municipal councils to make by-laws regulating the use of docks, wharves and landings in the municipality except where they are owned by the Crown.³² In addition, the Wharves and Public Landings Act gives municipal councils control of all public wharves or landings in the municipality that fall within the jurisdiction of the province.³³ Finally, under the Private Ways Act every owner or occupier of a mine, mill, quarry, farm or factory who is desirous of transporting the produce thereof to tidal or other waters, and every owner or occupier of timber lands who desires to enter on such lands and cut the timber and remove it to tidal or other waters, and who is unable to agree for a right of way with the owners of any land that it is necessary to cross to effect such entry or transportation may be permitted to do so on petitioning the Lieutenant-Governor in Council.³⁴

FLOW AND LEVEL

It is obvious that the provisions of the Water Act vesting the principal watercourses and the sole and exclusive right to use, divert and appropriate waters in the province and releasing such watercourses from every estate, interest, claim, right or privilege whatsoever may be so construed as to destroy rights respecting flow and level.³⁵ Particularly is this so in view of the provision that where the Minister has authorized a person to use a watercourse or its waters no action or other proceeding may be brought against such person. The only recourse against a person so authorized would appear to be the recovery of such compensation as may have been permitted by the Minister as a condition of the authorization; such compensation is to be fixed and determined by a judge of the Supreme Court appointed by the Minister.³⁶ Yet while no remedy other than such compensation appears to exist in respect of a use authorized under the Act, a person who makes use of water without authorization from the Minister may, it is suggested, make himself liable to an action if he thereby interferes with a person's common law rights respecting flow and level.³⁷ The courts have made it clear that the Act will be strictly construed.³⁸ While the intent of the legislature to control the waters of the province must be respected, it cannot have been the intention of the legislature to

30. R.S.N.S., 1967, c. 9, s. 2.

31. R.S.N.S., 1967, c. 335, s. 3(2).

32. R.S.N.S., 1967, c. 192, s. 191(37).

33. R.S.N.S., 1967, c. 338, s. 1.

34. R.S.N.S., 1967, c. 237, s. 1.

35. R.S.N.S., 1967, c. 335, ss. 2, 1(k).

36. *Ibid.*, s. 3(1), as amended by (1968), 17 Eliz. II, c. 64, s. 3 (N.S.).

37. See *Johnson v. Anderson* (1936), 51 B.C.R. 413.

38. See *Cook v. Davison Lumber and Manufacturing Co.* (1920), 53 N.S.R. 375; *Stanford v. Imperial Oil Co.* (1920), 54 N.S.R. 106; *Desbarres v. Polaris Shipping Co.* (1925), 58 N.S.R. 237.

deprive a person of his common law rights where such control is not exercised. In fact, in the original Water Act transitional provisions were made to preserve pre-existing rights.³⁹

Common law rights to regular flow and level may also be substantially affected under the Expropriation Act. Under this Act a Minister having control of a public work may alter the course of any watercourse temporarily or permanently for any purpose relative to the use, construction, maintenance or repair of the public work without the consent of the owner.⁴⁰

The regular flow and level of water may also be incidentally affected by the Ditches and Water Courses Act, and the Lands and Forests Act. The Ditches and Water Courses Act makes provisions for deepening and widening ditches and drains and to lead them to a proper outlet.⁴¹ The Lands and Forests Act empowers the Lieutenant-Governor in Council to reserve and set aside such Crown lands as are needed for protecting and regulating the regular flow of water within the lands so reserved.⁴²

POLLUTION

The common law rights against water pollution are supplemented in Nova Scotia by provisions in the Public Health Act,⁴³ the Water Act,⁴⁴ the Environmental Pollution Control Act,⁴⁵ the Municipal Act⁴⁶ and the Public Highways Act,⁴⁷ and are to some extent overridden by the provisions of the Smelting and Refining Encouragement Act.⁴⁸

Under the Public Health Act the Minister of Public Health has extensive powers to control and regulate water pollution. He may make regulations to provide for safe and potable water supplies, for the control of sources of water and systems of distribution, to control contamination or pollution of water to be used for human consumption respecting public drains and sewers, and for preventing pollution of lakes and streams.⁴⁹ Such regulations have been made respecting summer camps.⁵⁰ The Act also prohibits the use of water from bodies of water contaminated by sewage and refuse for the purpose of making ice for domestic use or for cooling and preserving foods.⁵¹ Finally, there is a rather wide provision to the effect that where there is any offensive matter or thing likely to endanger the public health deposited on a beach or foreshore, its removal may be ordered.⁵²

39. (1919), 9 & 10 Geo. V., c. 5 (N.S.); see *ibid.*

40. R.S.N.S., 1967, c. 96, s. 2(e).

41. R.S.N.S., 1967, c. 78, s. 1.

42. R.S.N.S., 1967, c. 163, s. 13.

43. R.S.N.S., 1967, c. 247.

44. R.S.N.S., 1967, c. 335.

45. R.S.N.S., 1967, c. 192.

46. (1970), 19 Eliz. II, c. 4 (N.S.).

47. R.S.N.S., 1967, c. 248.

48. R.S.N.S., 1967, c. 283.

49. R.S.N.S., 1967, c. 247, s. 11(1)(b), (d).

50. Made July 25, 1967, and tabled Dec. 1, 1967.

51. R.S.N.S., 1967, c. 247, s. 50(2).

52. *Ibid.*, s. 48.

Under the Water Act pollution is broadly defined as

...any alteration of the physical, chemical, biological or aesthetic properties of the waters of the Province, including change of the temperature, taste or odour of the waters, or the addition of any liquid, solid, radioactive, gaseous or other substance to the waters or the removal of such substances from the waters, which will render the waters harmful to the public health, safety or welfare, or harmful or less useful for domestic, municipal, industrial, agricultural, recreational or other lawful uses, or for animals, birds or aquatic life.⁵³

The Minister is given the control of pollution originating within the jurisdiction.⁵⁴ This general regulatory power is in practice exercised through the Nova Scotia Water Resources Commission for the protection of provincial waters. More specifically, the Minister may prohibit the discharge or order the discontinuance of any discharge of any material of any kind into a watercourse unless approved by the Minister of Public Health,⁵⁵ and may define and prescribe areas that are to be used for public water supplies; in such areas discharge of materials, bathing and washing are prohibited.⁵⁶ These are among the most important statutory provisions relating to water in Nova Scotia. The wide controlling power is exercised when authorizations to use waters are applied for, and pollution standards are written into such authorizations as conditions of their continuance. It is the legislative basis for the majority of government interferences and grants of aid to industries for purposes of cleaning up their processes.

Closely related to the Water Act is the recently enacted Environmental Pollution Control Act.⁵⁷ This Act provides for the creation of the Nova Scotia Environmental Pollution Council⁵⁸ whose functions are to investigate any situation that may cause pollution, to prepare programs to combat pollution, coordinate the work of the various provincial departments and agencies respecting pollution, and to perform such other duties as may be assigned to the Lieutenant-Governor in Council or the Minister appointed under the Water Act.⁵⁹ The Council may direct the Water Resources Commission to make investigations and reports respecting any matters relating to pollution or the control of pollution.⁶⁰ The Act also gives additional powers to the Minister appointed under the Water Act. He may direct the Commission to investigate and report on any act or omission that has resulted in pollution that is harmful to the public health,⁶¹ and on the basis of such report he may order any person to take remedial action.⁶² Refusal to comply with such an order constitutes an offence punishable on summary conviction.⁶³ Moreover, the Minister may authorize the Commission to take the necessary steps to combat pollution at the cost of the offending person.⁶⁴

The Municipal Act empowers a municipality that has constructed, purchased or otherwise acquired a sewage system to require owners of dwellings, shops,

53. R.S.N.S., 1967, c. 335, s. 1(f).

54. *Ibid.*, s. 12(c).

55. *Ibid.*, ss. 16, 8(1).

56. *Ibid.*, s. 17.

57. (1970), 19 Eliz. II, c. 4 (N.S.). The Act is discussed in somewhat more detail at pp. 140-1.

58. *Ibid.*, s. 2(1).

59. *Ibid.*, s. 3(1).

60. *Ibid.*, s. 3(2).

61. *Ibid.*, s. 4(1).

62. *Ibid.*, s. 4(2).

63. *Ibid.*, s. 4(4), (5).

64. *Ibid.*, s. 5.

stores or other buildings not further than sixty feet away from the sewer line to construct a drain and to connect it with the sewer line, but the municipality may exempt buildings that are either adequately served with sewer and drainage, or that would not be adequately served by such a connection.⁶⁵ Finally, the Public Highways Act prohibits people from depositing any sewage, garbage or rubbish on the highway or in any drain, gutter or watercourse along it.⁶⁶

On the other hand the Smelting and Refining Encouragement Act protects certain persons from liability for polluting water. Under this Act, no action lies against any person or company declared by the Lieutenant-Governor to be subject to the Act for polluting water by the escape of noxious matter or for committing a nuisance by such operations, if the operations are carried out with due care and such precautions are taken as are reasonably and commercially possible to prevent and minimize the damage caused by them.⁶⁷ It seems doubtful, however, that this section would provide a defence to a violation of the provisions of the Public Health Act or preclude a direction under the Water Act to cease discharging noxious materials in water.

RIGHTS RELATING TO USE

Consumption

Under this heading are discussed any provisions that in any way confer rights to use, raise money for, regulate and generally circumscribe the right to consume water, and includes provisions of the Water Act,⁶⁸ Public Health Act,⁶⁹ Municipal Act,⁷⁰ Municipal Affairs Act,⁷¹ Towns Act,⁷² Town Planning Act,⁷³ Provincial Parks Act,⁷⁴ and the Hotel Regulations Act.⁷⁵ Several of the applicable provisions have already been discussed and only passing reference will be made to them. The term "consumption" is taken to mean the use of water by persons for household use, by industries whose use of water is similar to household use and by towns and municipalities for fire fighting purposes.

Rights to use water for domestic purposes are obtained by applying for authority to do so under section 3 of the Water Act; the nature of the rights so obtained is determined by the wording of the order in council or authorization conferring it. These are listed in the Appendix to this chapter. However, not all uses of water for domestic purposes in Nova Scotia are authorized under the Water Act. For many years before the enactment of the Water Act such authorization was obtained by means of a private Act, and some towns and persons still treat these private Acts as the legal basis for the domestic user of certain bodies of water. The reason for this would appear to be that for many years after the passing of the Water Act it is doubtful that anyone thought such uses fell within

65. R.S.N.S., 1967, c. 192, s. 203.

66. R.S.N.S., 1967, c. 248, s. 42(1)(a).

67. R.S.N.S., 1967, c. 283, ss. 3, 4.

68. R.S.N.S., 1967, c. 335.

69. R.S.N.S., 1967, c. 247.

70. R.S.N.S., 1967, c. 192.

71. R.S.N.S., 1967, c. 193.

72. R.S.N.S., 1967, c. 309.

73. R.S.N.S., 1967, c. 308.

74. R.S.N.S., 1967, c. 244.

75. R.S.N.S., 1967, c. 127.

the scope of the Act. When the Water Act was first passed it apparently was thought of as an administrative tool in the hands of the Power Commission to enable it to acquire whatever watercourses were needed to implement a rational electric power policy in the province. In any case, several towns which had been using waters for domestic uses before the passing of the Act did not apply for authorization to continue to do so under the Act, but presumably they are still using those waters. This, coupled with the fact that the Minister's power under the Water Act in relation to water works and water used for domestic use, which was granted to him by a 1963 amendment,⁷⁶ purports only to apply to changes in existing water works or the establishment of a new water works, leads to the possibility that earlier private Acts may not have been overridden by the Water Act. Though the validity of some of these Acts may be open to doubt, the private Acts relating to the following entities should be noted:

- (1) Town of Yarmouth;⁷⁷
- (2) Town of Antigonish;⁷⁸
- (3) Town of Dartmouth;⁷⁹
- (4) Bear River Pulp Co., Ltd.;⁸⁰
- (5) Town of Oxford;⁸¹
- (6) Town of Mahone Bay;⁸²
- (7) City of Sydney;⁸³
- (8) Town of Hantsport;⁸⁴
- (9) Town of Lockport;⁸⁵
- (10) Caledonia Power and Water Board;⁸⁶
- (11) Halifax Public Service Commission.⁸⁷

Regulatory power over domestic uses of water is conferred by the Water Act. There is the provision against pollution mentioned in discussing riparian rights which enables the Minister appointed under the Water Act to designate certain areas as public water supplies.⁸⁸ Another provision provides that that Minister and the Minister of Public Health must approve any extension or change in an existing water works or the creation of new water works, and if such approval is not sought the Ministers have the power to inspect it and to order changes.⁸⁹

76. (1963), 12 Eliz. II, c. 42, s. 2 (N.S.).

77. (1893), 56 Vict., c. 193 (N.S.). The Act deals with Lake George.

78. (1901), 1 Edw. VII, c. 98 (N.S.). The Act deals with the Nappan River.

79. (1902), 2 Edw. VII, c. 56 (N.S.). The Act deals with Lamont and Topsoil Lakes.

80. (1924), 14 & 15 Geo. V, c. 124 (N.S.). The Act deals with East Branch.

81. (1902), 2 Edw. VII, c. 94 (N.S.). The Act deals with River Phillip and Black River.

82. (1903), 3 Edw. VII, c. 150 (N.S.). The Act deals with the Mushamush River.

83. (1903), 3 Edw. VII, c. 174 (N.S.). The Act deals with Dumareshq, Middle and Bray Lake.

84. (1905), 5 Edw. VII, c. 89 (N.S.). The Act deals with Davison Lake.

85. (1910), 10 Edw. VII, c. 84 (N.S.). The Act deals with Eisenhaur's Brook.

86. (1942), 6 Geo. VI, c. 80 (N.S.). The Act deals with McAskill's Brook.

87. (1963), 12 Eliz. II, c. 55 (N.S.). The Act deals with Chain, Long, Big, Indian, and Spruce Hills Lakes; see also (1945), 9 Geo. VI, c. 72 (N.S.). giving City of Halifax rights respecting Bayers Lake, Cocked Hat Lake.

88. R.S.N.S., 1967, c. 335, s. 17.

89. *Ibid.*, s. 13(1).

Where the water works are a menace to public health or where alterations are deemed necessary the Minister of Public Health has the further power to order any necessary alterations.⁹⁰ Finally, it is provided that water works shall at all times be maintained, kept in repair and operated in such a manner and with such facility as may be directed from time to time by the Minister appointed under the Water Act.⁹¹

Again, the Public Health Act⁹² provides for regulations of a general nature respecting waters used for domestic uses. These relate to safeguarding the potability of water and have already been discussed in relation to pollution.

Of less general application are the powers to acquire lands and to borrow to provide for domestic uses of water given to the various municipal units by the Municipal Act, the Municipal Affairs Act, the Towns Act, the Town Planning Act, and the Village Service Act. Under the Municipal Act municipalities may make by-laws and regulate, prohibit and license the digging of wells.⁹³ Towns have similar powers under the Towns Act.⁹⁴ Municipalities and towns have power to acquire land to maintain an adequate supply of water for domestic uses. Municipal councils may expropriate lands situate within the municipality for the purposes of creating, constructing and altering reservoirs, and to create or extend water systems and water works.⁹⁵ Under the Towns Act towns are empowered to construct, alter and maintain their water works and to acquire land, implements and machinery therefor.⁹⁶ Again, the Town Planning Act provides that a town planning board may make regulations concerning the installation of water services.⁹⁷ In Halifax and Dartmouth, plans for extensions of water supply lines must be approved by the Halifax-Dartmouth Regional Planning Commission.⁹⁸ Finally, commissioners under the Village Service Act are empowered to do all things necessary and effectual to construct, alter, extend and maintain a water works within and without the boundaries of the village.⁹⁹

Power to borrow and to apply money for purposes of insuring an adequate supply of water for domestic uses is conferred by the Municipal Act¹⁰⁰ and the Municipal Affairs Act.¹⁰¹ The Municipal Affairs Act gives to every municipality,¹⁰² city, and incorporated town,¹⁰³ and to the City of Halifax¹⁰⁴ power to raise money by borrowing for constructing, altering, extending and improving water works and water systems within the unit. Municipalities are authorized by the Municipal Act to apply monies (which would include monies borrowed) to improving waters

90. *Ibid.*, s. 13(4).

91. *Ibid.*, s. 13(5).

92. R.S.N.S., 1967, c. 247.

93. R.S.N.S., 1967, c. 192, s. 191(89).

94. R.S.N.S., 1967, c. 309, s. 221(60).

95. R.S.N.S., 1967, c. 192, s. 172(1) (c), (d).

96. R.S.N.S., 1967, c. 309, s. 116(1).

97. R.S.N.S., 1967, c. 308, s. 27(9) (a) (i).

98. *Ibid.*, s. 53(1) (c).

99. R.S.N.S., 1967, c. 329, s. 38(1) (d).

100. R.S.N.S., 1967, c. 192.

101. R.S.N.S., 1967, c. 193.

102. *Ibid.*, s. 6(f).

103. *Ibid.*, s. 5(f).

104. *Ibid.*, s. 9(g).

to be used for fire fighting purposes¹⁰⁵ to constructing and maintaining water works.¹⁰⁶ Similar powers to apply funds are found in the Towns Act¹⁰⁷ and the City of Halifax Charter.¹⁰⁸

Finally, powers relating to water used for domestic purposes are given under the Provincial Parks Act, and the Hotel Regulations Act. Under the former, the Minister is empowered to make regulations respecting the establishment and use of reservoirs and sources of water within a park.¹⁰⁹ Under the latter, the Lieutenant-Governor in Council may make regulations to ensure that there is a safe and adequate water supply in hotels.¹¹⁰

Electric Power Development

Under section 3(1) of the Water Act the Minister appointed under the Act may authorize any person to use water and watercourses for the purpose of generating hydroelectric and water power.¹¹¹ The existing authorizations are listed in the Appendix to this chapter. The exact nature of the right conferred depends on the wording of the authorization. Typical is the order in council of August 1, 1928, granting to the Nova Scotia Power Commission the right to use the Jordan River, which reads as follows:

Authorized to use the said water course and the waters therein and to construct, use and maintain all dams, intakes, weirs, conduits, or other structures in and on the said water course, necessary and expedient for the development of water storage . . .

In addition to authorizations under the Water Act there are a number of private Acts authorizing the use of waters to develop power.¹¹² Those enacted before 1919 would clearly seem to be no longer in effect because of section 2 of the Water Act. In fact, the wording of section 2 at first sight indicates that all these Acts are ineffective, but as already mentioned it seems doubtful the re-enactment of the Act should be construed as repealing statutes passed after the original Act.¹¹³

105. R.S.N.S., 1967, c. 192, s. 136(18).

106. *Ibid.*, s. 136(40).

107. R.S.N.S., 1967, c. 309, s. 112(c).

108. Confirmed by (1931), 21 Geo. V, c. 70, as amended. [For further provisions respecting Halifax and Dartmouth, see Addendum, p. 505.]

109. R.S.N.S., 1967, c. 244, s. 12(1).

110. R.S.N.S., 1967, c. 127, s. 101(1)(k). Regulations under this provision were made Dec. 14, 1961, and amended July 25, 1967.

111. R.S.N.S., 1967, c. 335.

112. (1899), 62 Vict., c. 135 (N.S.) gave the N.S. Electric Light Co. rights in Curll Brook; (1901), 1 Edw. VII, c. 147 (N.S.) gave rights to the Blockhouse Electric Light and Power Co. in the Mushamuk River; (1902), 2 Edw. VII, c. 65 (N.S.) gave rights to the Shelbourne Electric Co. in the Roseway River; (1905), 5 Edw. VII, c. 136 (N.S.) gave rights to the Gold River Mines and Power Co. in the Gold River; (1909), 9 Edw. VII, c. 167 (N.S.) gave rights to the Nova Scotia Power and Pulp Co. in the Gaspereaux River; (1914), 4 Geo. V, c. 182 (N.S.) gave rights to the Canadian Tungsten Mines Co. in the Northeast and Indian Rivers; (1914), 4 Geo. V, c. 180 (N.S.) gave rights to the Tramways Power Co. in the Gaspereaux River; (1916), 6 Geo. V, c. 96 (N.S.) gave rights to the Atlantic Power Co. in the Sackville River; (1917), 7 Geo. V, c. 192 (N.S.) gave rights to the Oxford Light and Power Co. in River Phillip; (1922), 12 Geo. V, c. 135 (N.S.) gave rights to the Waterville and Cambridge Electric Light and Power Co. in Lake Tupper; (1927), 17 Geo. V, c. 129 (N.S.) gave rights to the Town of Lawrencetown in the Annapolis River.

113. See p. 294.

The Power Commission Act empowers the Power Commission to “accumulate, store, divert, transmit, distribute, deliver, supply, utilize or otherwise dispose of water” for purposes incidental to the generation of electric power.¹¹⁴ To enable it to do so section 22(2) gives it power to acquire by purchase, lease or otherwise, or without the consent of the owner, expropriate, *inter alia*, watercourses, water privileges, and water powers. Distinct from this power is the Commission’s authority to use lands, watercourses, dams, buildings, structures and improvements that are necessary, requisite and useful for the storage of water, which contemplates the acquisition of pre-existing power developments.¹¹⁵ Because of the provisions of the Water Act, however, these provisions are more restricted than they would seem to be at first sight. Section 2 of that Act declares that all waters and watercourses are vested in the Crown. Consequently all that could be acquired from anyone other than the Crown is the authority to use water granted under section 3 of that Act, assuming such authority is transferable. Moreover, the Water Act does not authorize the Crown to purchase or lease waters and watercourses, but only to grant authorizations to use them. Accordingly, it would appear that when the Power Commission desires to acquire rights to use water, it must, in most cases at least, obtain authority to do so under section 3 of the Water Act. The only possible exception is if the Commission acquired the works of someone already authorized to use water for the generation of power. This probably explains why the Commission in practice always seeks authorization under the Water Act.

Finally, the provision of the Lands and Forests Act by which the Lieutenant-Governor in Council may set apart such Crown lands as are necessary for the development of water power to be derived therefrom should be mentioned.¹¹⁶

Other Uses

The Minister under the Water Act may, under section 3, authorize other uses of water. These authorizations are listed in the Appendix to this chapter.

RIGHTS RESPECTING THE BED

The common law rules respecting the ownership of the beds of water have been largely swept away by the Water Act.¹¹⁷ Section 2 of that Act vests every watercourse in the Crown in the right of the province, and section 1(k) defines a watercourse as including the bed; the only exceptions are small rivulets and brooks unsuitable for milling, mechanical or power purposes. The beds of waters falling within this exception are free of statutory interference except under the Assessment Act.¹¹⁸ Under that Act “real property” includes land covered with water and the Act goes on to provide that rates and taxes levied in respect of real property constitute a lien upon the real property. Consequently, the Crown may enjoy the rights arising out of a lien for taxes on real property in the beds of small rivulets and brooks excepted from the definition of a watercourse in the Water Act.

114. R.S.N.S., 1967, c. 233, s. 22(1).

115. *Ibid.*, s. 22(3) (d).

116. R.S.N.S., 1967, c. 163, s. 13.

117. R.S.N.S., 1967, c. 335.

118. R.S.N.S., 1967, c. 14, ss. 1(g) (i), 153(1).

APPENDIX

AUTHORIZATIONS CONFERRING RIGHTS OVER WATER UNDER THE WATER ACT¹¹⁹

A. Floating¹²⁰

Recipient	Watercourse	Authorization ¹²¹
Bowater-Mersey Paper Co.	Indian River	June 25, 1930 36-198
Ernest, Harold	Mushamush River	Dec. 1, 1959 73-217
MacKay, Gordon B.	Big Brook	July 31, 1928 34-51
Minas Basin Pulp & Power Co. Ltd.	Halfway River	Jan. 25, 1928 33-210
Scott Paper Co. Ltd.	County Harbour River	Oct. 10, 1929 35-147
	Moser River	Oct. 10, 1929 35-149
	West River, Sheet Harbour,	July 24, 1931 37-165
	Little West River	
Silver, R.R.	Medway River	Nov. 6, 1951 60-152

B. Domestic Water Supplies¹²²

Recipient	Watercourse	Authorization ¹²³
Antigonish, Town of	Clydesdale River	Dec. 23, 1946 52-293
Berwick, Town of	Factorydale Brook or River,	Sept. 11, 1952 62-1
	South River Lake, Meed Lake	
	Boot Lake, Palmer Lake,	
	Upper Palmer Lake	
	Randall Lake, Mumford Brook	March 23, 1960 74-75
	Birch Lake	Dec. 28, 1961 76-294
Bridgewater, Town of	Petite Rivière	July 13, 1933 39-115
Canada, Federal Government	Morris or MacDonald Lake	March 17, 1942 48-212
	Brook	
Cape Breton, County of	Sand Lake	Oct. 13, 1950 58-177
Cape Breton Development Corp.	Sydney River	March 19, 1949 52-237
Dartmouth, Town of	Tobin Brook	July 25, 1941 48-26
Digby, Town of	Lily Lake	March 5, 1929 34-293
Glace Bay, Town of	Sand Lake, McAskill's Brook	Nov. 27, 1941 48-144
Halifax, City of	Chain (or Chocolate)	Aug. 6, 1940 46-288
	Lake Brook, Long Lake Brook	
	Fish Brook, Prospect River,	
	Prospect River,	Nov. 27, 1941 48-147
	Partridge or	
	McGrath's Brook	
Horton, Lloyd F.	Cutler (or Carding)	June 12, 1935 41-86
	Mill Brook (for hotel)	
Kentville, Town of	McGee Lake, Mill Brook	Aug. 17, 1927 33-88
Louisbourg, Town of	Gerard Brook, Kelly Lake,	Feb. 18, 1952 61-1
	Morrison Lake,	
	Stewart Lake	
Minister of National Defence	Wright Brook	March 15, 1944 50-118
	Rodney Lake Brook	March 15, 1944 50-119
	Moose River	March 15, 1944 50-120
Minister of Transport (federal)	Bennery Long Lake	Nov. 8, 1960 75-40
Public Service Commission of	Pennant River	April 13, 1946 52-50
Halifax		

119. For more detailed tables, see the predecessor to this work, *Water Resources of the Atlantic Provinces—The Legal Framework*, Vol. IV, Appendix, Part VI.

120. The headings overlap somewhat; see also "D. Other Uses".

121. Some of the authorizations here have expired but are being continued on a year to year basis. Floating is becoming obsolete.

122. Until the 1968 amendment of the Water Act authorizations were made by order in council; now they are authorized by the Minister appointed under the Act.

123. See *Ibid.*

C. Power Development

Recipient	Watercourse	Authorization ¹²⁴	
Bridgewater, Town of (Public Service Comm.)	Petite Rivière	May 30, 1939	45-137
Digby Co. Power Board	Daley Brook, Sissiboo River	Nov. 10, 1936	42-176
Minas Basin Pulp and Power Co. Ltd.	St. Croix River, Ponhook Lake	Aug. 29, 1961	76-112
Moirs Ltd.	Kearney Lake	Oct. 8, 1928	34-134
Nova Scotia	Gaspereaux River	Oct. 28, 1919	26-277
Light and Power Co. Ltd.	Avon River,	March 30, 1922	28-255
	Black River, West Branch, Forks River,	Aug. 18, 1927	33-98
	Fall River, Miller Lake, Soldier's Lake, Granite Lake, Preeper Big Lake	Aug. 8, 1928	34-75
	Little River	April 25, 1931	37-81
	Gaspereaux River, Trout Lake	June 5, 1931	37-126
	Black River	Aug. 4, 1938	44-139
	Black River	March 7, 1941	47-221
	Black River	Sept. 4, 1942	49-40
	Paradise River, Daneil's Brook	July 20, 1949	56-139
	Hatchery Brook	April 24, 1950	57-214
	Nictaux River	Dec. 22, 1952	62-252
	Lequille River	Sept. 18, 1959	73-180
Nova Scotia Power Commission	Liscomb River	Dec. 10, 1919	27-7
	Harrison Lake	Dec. 24, 1926	32-219
	Northeast and Indian Rivers, East River, Sheet Harbour, Mushamush River	Oct. 29, 1927	33-171
	Mersey (or Liverpool) River	April 30, 1928	33-298
	Jordan River	Aug. 1, 1928	34-61
	Tusket River, East Branch, Tusket River, West Branch, Tusket River	Oct. 8, 1928	34-135
	Roseway River	Aug. 1, 1930	36-113
	Mersey River	Sept. 28, 1938	44-200
	Ingram River	Aug. 4, 1939	45-237
	Dickie Brook	Dec. 23, 1946	52-290
	Larry's River, Donahue Lake	Dec. 23, 1946	52-291
	Mersey (or Liverpool) River	Oct. 9, 1948	55-37
	Bear River	Oct. 13, 1950	58-176
	Sissiboo River	Oct. 28, 1960	74-215
	Landry Lake, Little River	Feb. 20, 1968	87-101

124. See *Ibid.*

D. Other Uses

Recipient	Water Course	Authorization ¹²⁵		Purpose
Acadia Atlantic Sugar Refineries Ltd.	Morris or MacDonald Lake	Apr. 24, 1950	57-211	Domestic and manufacturing purposes
Ashburn Golf Club	Kinsac Lake	Oct. 24, 1969	294	
Canadian Rock Salt Co.	McLeod Lake	Dec. 6, 1961	76-277	Fresh water supply
Cumberland Ry. and Coal Co.	Maccan River	July 25, 1941	48-27	Fresh water supply
Clyde Everett Ltd.	Bloody Creek, Annapolis County	Dec. 15, 1969	298	
Decker, Harold E.	A small lake or watercourse	May 20, 1970	303	To hatch or rear trout
Dominion Iron and Steel Co.	Sydney River, Grand Lake	May 26, 1921	26-60	For domestic and manufacturing purposes re mining and smelting
Dominion Tar and Chemical Co.	Blair Lake	Jan. 3, 1946	51-274	Water supply for manufacturing
Folley Lake Aggregates Ltd.		Apr. 8, 1970	301	Additional source of water
Halifax Wildlife Assoc.	Dufferin-Salmon River	March 17, 1970	300	Control Dam
Honey, Frank	Brook Tributary R.R. No. 1 Wilmot	Oct. 21, 1969	297	
Kerr, Andrew	Bear River	Aug. 12, 1969		Allocation of water slot
Little Narrows Gypsum Co.	McAskill's Brook	Feb. 27, 1936	41-286	Water for plant
Lyndhurst Farms Ltd.	Habitant Creek	June 25, 1962	77-203	Irrigation
Maritime Sand and Gravel	Little Salmon River	Aug. 29, 1962	77-300	Gravel washing
New Germany Fire Department	Little Salmon River	Feb. 27, 1963	78-196	
Nova Scotia Housing Commission	LaHave River	Jan. 6, 1970	299	
Nova Scotia Water Resources Commission	Lower Sackville	Oct. 2, 1969	296	
	Landry Lake, MacIntyre Lake, Beaverdam Lake, Land at French Lake	March 17, 1967	85-40	Water supply for industry
		July 25, 1967	85-237	Fresh water pumping station
Oakfield Country Club	Fish Lake	Dec. 27, 1967	78-108	Recreation, irrigation and water supply
Seaboard Power Corp.	Little Glace Bay Brook, Old Bridgeport Dam (Reservoir), Waterford Lake, Dominion No. 2 Reservoir, Sand Lake and McAskill Brook, McDonalds Lake, No. 6 Reservoir, Grand Lake, Kilkenny Lake, Howley Lake	May 26, 1921	28-62	Mining and domestic purposes

¹²⁵. See *Ibid.*

CHAPTER FIFTEEN

Newfoundland Statutes Respecting Rivers, Streams and Lakes

By Gerard V. La Forest and W. H. Charles

GENERAL

The Water Resources and Pollution Control Act declares that, except for rights conferred by the statutes specifically enumerated in the Act as well as rights conferred by other statutes or law or any valid grant, lease, licence or other instrument, the property in and the right to the use and flow of all water at any time in any body of water in the province vests in Her Majesty, and no right to divert or use water or any body of water may be acquired by prescription.¹ A body of water is defined to include the land usually or at any time occupied by any body of water.² As of July 1, 1967, therefore, ownership of the beds of rivers, streams, brooks, creeks, watercourses, lakes, ponds, springs, lagoons, ravines, gulches, canals and the land under any flowing or standing water not already granted by any statute, law, grant or lease belongs to the Crown.

As already seen, at common law the owner of land adjoining a body of water ordinarily owned *ad medium filum aquae*, but the Crown could, of course, expressly reserve the bed in grants of Crown land, or the reservation might be specifically required by statute. Apparently specific reservations in Crown grants were made before 1851.³ In 1884, an amendment to the Crown Lands and Timber Act provided that not less than 25 and not more than 100 feet around all lakes, and ponds and on both banks of all rivers would be reserved from all grants.⁴ The present Crown Lands Act provides that in all Crown grants, leases and licences there shall be reserved a strip not less than 33 feet wide.⁵ The Crown thus retained riparian rights and the ownership of the bed.

Before 1884 the Lieutenant-Governor in Council was authorized by the Crown Lands and Timber Act⁶ to reserve portions of beaches and shores for general and public use. The present Act also protects the public right to enter upon, use or occupy lands forming part of the bed of any lake, river, stream or other watercourse.⁷ In the case of grants to settlers and mill operators, the amount of river and coastal frontage was restricted by the earlier Act.⁸

In addition, agreements with the Lake Melville Development Company,⁹ and

1. 1966-7, no. 57, s. 17 (Nfld.). [See now the Clean Air, Water and Soil Authority Act, discussed in the Addendum, at pp. 505-6.].

2. *Ibid.*, s. 2(e).

3. *Robinson v. Murray* (1851), 3 Nfld. L.R. 184.

4. (1884), 47 Vict., c. 2, s. 22 (Nfld.).

5. R.S.N., 1952, c. 174, s. 121.

6. See R.S.N., 1892, c. 13, s. 16.

7. R.S.N., 1952, c. 174, s. 46(2).

8. R.S.N., 1872, c. 46, s. 1.

9. 1939, No. 29, Sch., cl. 26 (Nfld.).

with M. J. Mooney¹⁰ contain reservations along the banks of rivers and around ponds for a public right of way.

NAVIGATION

In several agreements between the government and private companies and individuals the right of navigation is expressly reserved. These are listed in dealing with the right of access.¹¹ A similar reservation is made in giving a right to run cables under waterways. These rights are dealt with in relation to rights relating to the bed.

FLOATING

General Right

As already noted, the right to float logs and timber in Newfoundland has been judicially recognized to exist at common law,¹² and from at least as early as the Crown Lands Act of 1884 it has also been assumed to exist by statute.¹³ The relevant portions of that Act have been re-enacted from time to time¹⁴ and now appear as sections 82 and 83 of the existing Crown Lands Act¹⁵ which read as follows:

82. (1) No licence or grant of any Crown Land shall give or convey any right or title to any slide, dam, pier or boom or other work for the purpose of facilitating the descent of timber or saw logs, previously constructed on such land, or in any stream passing through or along such land, unless it is expressly mentioned in the licence or grant that such slide, dam, pier or boom or other work is intended to be thereby granted.

(2) The free use of slides, dams, piers, booms or other works on streams to facilitate the descent of lumber and saw logs, and the right of access thereto for the purpose of using the same and keeping them in repair, shall not in any way be interrupted or obstructed by or in virtue of any licence or grant of Crown Land made subsequent to the construction of such work.

83. The free use, for the floating of saw logs and other timber rafts and draws of all streams and lakes that may be necessary for the descent of timber, and the right of access to such streams and lakes, and the passing and repassing on and along the land on either side thereof, whenever necessary for use thereof, and over all existing and necessary portage roads past any rapids or falls, or connecting such streams or lakes and over such roads, other than road allowances, as owing to natural obstacles may be necessary for the taking of timber or saw logs from lands, and the right of constructing slides where necessary, shall continue uninterrupted and shall not be affected or obstructed by or in virtue of any licence or grant of such lands, or by virtue of any licence to cut timber held by one person as against any other person holding a licence for the same purpose.

Until 1949 no approval was required to construct a dam for the purpose. The 1884 Act appears to have assumed that parties floating logs have a right to build slides, dams, piers and booms to facilitate driving. Since 1949, however, such dams are not to be constructed or altered without the prior approval of the Lieutenant-Governor in Council.¹⁶ Section 84 reads as follows:

10. (1923), 14 Geo. V, c. 4, Sch., cl. 3 (Nfld.).

11. See p. 318.

12. See *Robinson v. Murray* (1851), 3 Nfld. L.R. 184; *Hugh W. Simmons Ltd. v. Foster* (1953), 32 M.P.R. 243, and on appeal: [1955] S.C.R. 324, *per* Rand J.; *cf.*, *Nardini v. Reid* (1898), 8 Nfld. L.R. 134.

13. Crown Lands Act, 1884, c. 2, ss. 57, 58 (Nfld.).

14. C.S.N., 1896, c. 13, s. 56; C.S.N., 1916, c. 129, s. 34; (1930), 21 Geo. V, c. 15, s. 137 (Nfld.).

15. R.S.N., 1952, c. 174.

16. 1949, c. 27, s. 3; now appearing as R.S.N., 1952, c. 174, s. 84.

84. (1) No person shall construct or alter, or commence the construction or alteration of any dam for the diversion or storage of water in connection with the floating of logs or timber of any kind whatsoever unless he shall have received the prior approval in writing of the Lieutenant-Governor in Council.

(2) Every application for approval as aforesaid shall be accompanied by plans showing the location of the dam in relation to the surrounding land, and particulars of its length, height, and width, and of its type, and the material to be used therein, and such further plans and particulars as the Lieutenant-Governor in Council may require.

(3) Any such dam shall, if approved in accordance with the provisions of subsection (2) of this section be constructed or altered according to such plans and particulars as aforesaid and subject to such conditions as to construction or alteration as the Lieutenant-Governor in Council may stipulate in addition thereto or in lieu thereof.

(4) Notwithstanding anything to the contrary in this section contained in any case where it appears to the Lieutenant-Governor in Council or to any person thereunto authorized by him in writing that the urgency of the circumstances, or any other good and sufficient reason renders it desirable to do so, he may dispense with the requirements that plans and particulars shall be furnished by the applicant and may give his approval with or without conditions as to the construction or alteration of any such dam.

(5) Every person violating or failing to conform with any of the provisions of this section shall be guilty of an offence and shall, on summary conviction, be liable to a fine not exceeding four hundred dollars and in default of payment to imprisonment for a period not exceeding twelve months, and any court of summary jurisdiction may order any such person within such reasonable period of time as may be limited by such order to remove any such dam, or to repair or replace the same to the satisfaction of the Minister.

In the early case of *Nardini v. Reid*¹⁷ (which denies the existence of a common law right to float), it was held that the right under the Crown Lands Act was limited to floating logs from Crown lands upon which licences to cut timber have been granted. But in addition to the provision in the Crown Lands Act, the right of floating was expressly provided for by the Transportation of Timber Act, 1904,¹⁸ section 1 of which reads as follows:

1. It shall be lawful for all persons whomsoever to float saw logs and other timber, rafts and draws over all streams and lakes within the colony, when necessary for the descent of such logs or other timber.

The public right to float in Newfoundland does not appear to be substantially different from that developed in New Brunswick at common law.¹⁹ Though section 1 of the Transportation of Timber Act, 1904, speaks only of "streams and lakes", the section has been broadly construed to include brooks and rivulets and other streams upon which logs may be floated at least in a commercial sense.²⁰ There is no reason to believe the word would be interpreted otherwise in the Crown Lands Act.

The Crown Lands Act underscores some rights about which there might be doubts. Section 82 provides that licences or grants of Crown lands give no right or title to slides, dams, booms, piers or other works constructed on such lands for log driving purposes, unless expressly mentioned in the licence or grant. Section 82(2) ensures that a person who had constructed such dams would have the free use

17. (1898), 8 Nfld. L.R. 134.

18. (1904), 4 Edw. VII, c. 13 (Nfld.).

19. See pp. 191-5.

20. *Hugh W. Simmons Ltd. v. Foster*, [1955] S.C.R. 324; see also *Caldwell v. McLaren* (1884), 9 A.C. 392.

thereof for driving logs and access thereto for using or repairing them. It will be remembered, too, that the Act contemplated that such dams might be built without Crown permission, though this is now required by section 84. Finally section 83 provides that persons for the purpose of floating logs shall have access to streams and lakes, and have the right of going on the riparian land whenever necessary and on all existing and necessary portages past rapids or falls or connecting such streams or lakes as well as on all roads, other than road allowances, as owing to natural obstacles may be necessary for taking timber and saw logs from such lands. Finally, the right to build slides where necessary continues notwithstanding any licence or grant or by virtue of any licence to cut timber held by one person as against another person holding a licence for a similar purpose.

The workings of the right may be exemplified by the major case on these statutes, *Hugh W. Simmons Ltd. v. Foster*.²¹ There both the plaintiff and defendant operated saw mills on the Colinet River, a tidal water for a short distance above the plaintiff's mill. To enable driving operations to be carried on in summer when the natural flow was not sufficient for the purpose, the plaintiff built dams upstream at Ripple Pond and another on a tributary, the Back River. In June, 1951, the plaintiff brought down its first drive of the season by opening the Ripple Pond dam, holding back another drive behind the Back River dam and, as required by the salmon regulations, left the Ripple Pond dam open. The defendant requested that it be closed but, in the absence of permission by the Crown, the plaintiff refused to do so. The defendant then, mistakenly anticipating rain, started his drive and his logs became stranded. The plaintiff then brought action in damages claiming that the obstruction of the river by the defendant's logs had prevented it from bringing down its second drive and forced it to close its mill. It further claimed that the defendant had committed a trespass by moving a boom placed above its mill. The defendant counterclaimed that he was entitled to the unrestricted flow of the river to drive his logs so that the plaintiff had no right to hold back the waters behind his Back River dam. After issue of the writ the Ripple Pond dam was closed and on its opening the defendant was able to complete his drive. The Supreme Court of Canada held that under the statutes both parties had equal rights to float on the Colinet. The plaintiff could not succeed because, though the river was obstructed by the defendant's logs, the plaintiff had not suffered damages. So far as the moving of the boom was concerned, the defendant had a right to move it in the exercise of his right of passage. No harm had been done to it and it had been moved back. The defendant's counterclaim also failed. It would impose a duty on the plaintiff which might seriously affect its operations while conferring no benefit on the defendant, for the natural flow at that season was insufficient to float the logs. The Crown Lands Act was enacted on the assumption that a person had a right to build dams to float logs.

Private Statutes

There are a number of private Acts that confirm agreements between the government and private parties in which the right to use provincial waters to float

²¹ *Ibid.*

logs and timber is granted either expressly²² or by implication.²³ In some cases the right to erect dams and sorting booms is also granted,²⁴ but the rights of the public and third parties are also considered and protected.²⁵ Several of the statutory agreements contain provisions that permit other persons to make temporary use of the watercourses, dams or sorting booms to float logs to their mills, provided the third parties pay the licence holder a reasonable sum for use of the watercourse and facilities.²⁶ In other instances the agreements stipulate that ministerial approval is required before dams or booms can be erected²⁷ or the waters used to float rafts, logs or timber.²⁸ There is the occasional agreement by which the grantee of flotation rights agrees not to conduct log driving operations that will interfere with the passage of salmon through the waters.²⁹

These statutes may be tabulated as follows:

(1) An Act to Encourage the Manufacture of Pulp and Paper in this Colony;³⁰

(2) Malcolm Joseph Mooney Agreement with Government Act;³¹

22. See International Forest Products Limited (Confirmation of Agreement) Act, 1953, No. 36; The Government-Crown Zellerbach Corporation (Authorization of Agreement) Act, 1958, No. 42; Newfoundland and Labrador Corporation Limited Act, 1951, No. 88; Newfoundland and Labrador Corporation Ltd. (Amendment) Act, 1965, No. 53 (Nfld.).

23. See An Act to Encourage the Manufacture of Pulp and Paper in this Colony (1905), 5 Edw. VII, c. 10 (Nfld.). (For recent statutory agreements affecting water, see Addendum, p. 508J.)

24. *Ibid.*; see also Malcolm Joseph Mooney Agreement with Government Act (1923), 14 Geo. V, c. 4; International Forest Products Ltd. (Confirmation of Agreement) Act, 1953, No. 36; The Government-Crown Zellerbach Corporation (Authorization of Agreement) Act, 1958, No. 42 (Nfld.).

25. See The Government-British Newfoundland Ltd.-N. M. Rothschild and Sons Confirmation of Agreement Act, 1953, No. 63; The Government-Crown Zellerbach Corporation (Authorization of Agreement) Act, 1958, No. 42; Newfoundland and Labrador Corporation Limited Act, 1951, No. 88; The Government-Flintkote Company-Atlantic Gypsum Ltd. (Lease) Act, 1960, No. 80; Churchill Falls Labrador Power Corporation Ltd. (Lease) Act, 1961, No. 51 (as renamed by 1965, No. 45); The Alexis Watershed (Timber Operations) Act, 1962, No. 41; The British Newfoundland Corporation Ltd. (Lower Churchill River Lease) Act, 1966-7, No. 73 (Nfld.).

26. See An Act to Encourage the Manufacture of Pulp and Paper in this Colony (1905), 5 Edw. VII, c. 10; Malcolm Joseph Mooney Agreement with Govt. Act (1923), 14 Geo. V, c. 4 (Nfld.).

27. International Forest Products Ltd. (Confirmation of Agreement) Act, 1953, No. 36 (Nfld.).

28. Grand Falls and Other Areas Electricity Supply (Amendment) Act, 1956, No. 36, as amended by 1962, No. 58 (Nfld.).

29. An Act to Encourage the Manufacture of Pulp and Paper in this Colony (1905), 5 Edw. VII, c. 10 (Nfld.).

30. (1905), 5 Edw. VII, c. 10 (Nfld.). Section 6 stipulates that nothing in the agreement between the Governor of the Colony of Newfoundland in Council or the Government and the Anglo-Newfoundland Development Company shall abridge the use by Exploits River Lumbering and Pulp Company and that of J. B. Miller, both of whom have licences from the Crown to use the Exploits River and its tributaries for the floating of logs, or other purposes connected with the lumbering, sawing, milling or pulp business. The Anglo-Newfoundland Development Company in the agreement is given the right to use all streams, lakes and watercourses within the grant and the power to maintain any dams and sorting booms, subject to the right of any person to use the lakes, streams or water courses temporarily or any dams or sorting booms for the purpose of floating logs or lumber belonging to their mills, provided they pay the Anglo-Newfoundland Development Company a reasonable sum for their use. Although there is no specific reference to the right to float logs down the streams, the company is given in fairly broad terms the right to use the waters. A right to float logs would appear to be implied, particularly in view of the references to the right of other persons to temporarily use the rivers to float logs.

31. (1923), 14 Geo. V, c. 4 (Nfld.). The agreement contains the same provisions as the Anglo-Newfoundland Development Company agreement insofar as flotation is concerned and the right of other people to make temporary use of the streams for transporting logs and so on.

(3) International Forest Products Ltd. (Confirmation of Agreement) Act;³²

(4) The Government-British Newfoundland Ltd.-N. M. Rothschild and Sons Confirmation of Agreement Act;³³

(5) The Government-Crown Zellerbach Corporation (Authorization of Agreement) Act;³⁴

(6) Newfoundland and Labrador Corporation Limited Act;³⁵

(7) The Newfoundland and Labrador Corporation Ltd. (Amendment) Act, 1965;³⁶

(8) The Government-Flintkote Company-Atlantic Gypsum Ltd. (Authorization of Agreement) Act;³⁷

(9) Churchill Falls (Labrador) Power Corporation Ltd. (Lease) Act;³⁸

32. 1953, No. 36 (Nfld.). Clause 12 of the agreement gives the company the right to use the rivers and their tributaries flowing into Sandwich Bay and to erect dams and booms on them in order to facilitate the driving of logs. However, there is a provision that the company will not erect dams or booms or effect river improvements without having first obtained the approval of the Minister of Mines, Agriculture and Resources. There is also a provision in the agreement that the company will only conduct its log-driving operations so as not to interfere with the passage of salmon through the rivers, streams and lakes.

33. 1953, No. 63 (Nfld.). Clause 9(6) of the agreement provides that the government may in connection with any proposed development by the company of water power rights granted under the agreement require that the corporation make provision for the passage and floating of logs along the rivers, streams and waterways to be developed. [For a recent amendment to the agreement, see Addendum, p. 508].

34. 1958, No. 42 (Nfld.). In clause 12(1)(b) of the agreement the government reserves for the public, subject to applicable laws and regulations now or hereafter existing, the free use of lakes, ponds and rivers in the grant area for floating logs or other timber. In clause 18 the company is given the right to use any and all rivers, streams, lakes, bays and other bodies of water in the province to facilitate the driving of logs and the transportation and storage of logs and other products and materials in connection with its operations and to erect dams, booms, piers, holding grounds and other works thereon.

35. 1951, No. 88, as amended (Nfld.). Section 2 of the 1959 amendment (1959, No. 24) to this Act repeals section 8A, and in the new section 8A(16) the corporation is given the right to use any and all rivers, streams, lakes, bays and other bodies of water in the province and to erect dams, booms, piers, holding grounds and other works thereon to facilitate the driving of logs and the transportation or storage of logs and other products and materials in connection with its operations. Section 7 of the 1959 Act also repeals section 8M of the 1951 Act and provides that residents of the province may use freely any lakes, rivers and ponds therein for floating logs or other timber of any kind whatsoever.

36. 1965, No. 53 (Nfld.). This Act further amends the 1951 Act. In the 1951 Act the government of Newfoundland had granted the Labrador Corporation Ltd. certain rights. In the 1965 amendment the Lieutenant-Governor in Council agrees to grant to the corporation the right to use the Kenamu River and streams contiguous to it for the purpose of floating, storing and driving logs and to construct thereon, therein and thereunder dams and other facilities for the purposes of the corporation. It also granted to them a right of way for a pipeline to be used to float wood in any form in the mouth of the Kenamu River to the Chateau Bay area. These rights are subject to several agreements between the government and the British Newfoundland Corporation-N. M. Rothschild and Sons.

37. 1959, No. 80 (Nfld.). Clause 12 in Schedule B stipulates that the residents of the province may, subject to any assurance of surface rights granted to the Flintkote Company and subject to applicable laws, use freely the lakes, ponds and rivers therein for floating logs or other timber of any kind whatsoever. Since this is a mining agreement there is no specific provision for flotation rights insofar as the Flintkote Company is concerned. [For a recent amendment to this agreement see Addendum, p. 508].

38. 1961, No. 51 (as renamed by virtue of 1965, No. 45) (Nfld.). In Part I of the lease certain reservations are included. One reservation is the right of the public to use freely all lakes, ponds and rivers included in the upper Churchill for floating logs or other timber of any kind whatsoever. [For a recent amendment to this agreement, see Addendum, p. 508].

(10) Grand Falls and Other Areas Electricity Supply (Amendment) Act;³⁹

(11) The Alexis Watershed (Timber Operations) Act, 1962;⁴⁰

(12) The British Newfoundland Corporation Ltd. (Lower Churchill River Lease) Act.⁴¹

In addition to these statutory agreements there are numerous agreements in which flotation rights have been conferred on private persons and corporations, where it has not been felt necessary to grant statutory confirmation or recognition. These agreements cannot, of course, be ignored.

FISHING

Reservation of Public Right

Many agreements with private companies and individuals contain a clause designed to protect the public right to fish in bodies of water situated within the leased area. Sometimes this is accomplished by an express reservation of a strip around the bodies of water involved⁴² like that provided in the Crown Lands Act. In other agreements there is simply a declaration by which the government reserves and excepts from the lease a public right to fish.⁴³ Several agreements specifically provide that the public right to fish can only be invoked subject to the exercise of rights conferred by the lease or as granted by other agreements and only if the public right does not interfere with the particular rights granted.⁴⁴ Older

39. 1962, No. 58 (Nfld.). This Act amends section 5 of the Grand Falls and Other Areas Electricity Supply Act of 1956 (1956, No. 36) by repealing section 5(a) and inserting the following provision: "(a) No person shall float rafts, logs or any other timber of any kind whatsoever (i) in that part of Ratting Brook extending from Ratting Lake to the sea at Nosh's Arm; or (ii) in that part of Sandy Brook extending from the junction of West Brook and Sandy Brook to the Exploits River, without a prior permit in writing of the Minister of Mines, Agriculture and Resources, and except in accordance with such terms and conditions which the Minister may in his discretion prescribe in that permit."

40. 1962, No. 41 (Nfld.). Section 12 of the Act stipulates that in every licence issued to Bowaters there shall be reserved to the government, its grantees, lessees, licensees, permittees and any other persons authorized by the government, subject to the right of Bowaters to drive timbers thereon provided by any other Act or law, all waters and water power on, in and under the Alexis watershed. There is also reserved for the public, subject to applicable laws and regulations now or hereafter existing and subject to the similar right of Bowaters, the free use of all lakes, ponds and rivers in the Alexis watershed for floating logs or other timber of any kind whatsoever.

41. 1966-7, No. 73. The lease in Part I contains certain reservations. One includes the public right to use freely all lakes, ponds and rivers included in the Lower Churchill for floating logs or other timber of any kind whatsoever. [For a recent amendment to this agreement, see Addendum, p. 508.]

42. An Act to Encourage the Manufacture of Pulp and Paper in this Colony (1905), 5 Edw. VII, c. 10 (Nfld.).

43. The Government-Crown Zellerbach Corporation (Authorization of Agreement) Act, 1951, No. 88, s. 8M, as enacted by 1959, No. 34, s. 7; Newfoundland and Labrador Corporation Limited Act, 1958, No. 42, Sch., cl. 12(1); The Government-Flintkote-Atlantic Gypsum Ltd. (Authorization of Agreement) Act, 1960, No. 80, s. 12, Sch. B, cl. 12; Churchill Falls (Labrador) Corporation Ltd. (Lease) Act, 1961, No. 51 Sch., cl. 1(g), (h), (c) (as renamed by 1965, No. 45); The Alexis Watershed (Timber Operations) Act, 1962, No. 41, Sch., c. 12; The British Newfoundland Corporation Ltd. (Lower Churchill River Lease) Act, 1966-7, No. 73 Sch., cl. 1 (Nfld.).

44. An Act to Encourage the Manufacture of Pulp and Paper in this Colony (1905), 5 Edw. VII, c. 10, s. 7; The Government-Flintkote-Gypsum Company (Authorization of Agreement) Act, 1960, No. 80, s. 12, Sch. B, cl. 12 (Nfld.).

agreements neglected to expressly confer a right of ingress or egress to the waters in which the public right to fish had been expressly protected. Later agreements remedy this omission and confer the additional right of public access as well.

The agreements authorized by the following statutes contain a clause affecting the right to fish:

(1) An Act to Encourage the Manufacture of Pulp and Paper in this Colony;⁴⁵

(2) Malcolm Joseph Mooney Agreement with Government Act;⁴⁶

(3) Holyrood Pond Fisheries Limited Agreement Act;⁴⁷

(4) Confirmation of Agreement between Government and Santa Cruz Oil Corporation Act;⁴⁸

(5) International Forest Product (Confirmation of Agreement) Act;⁴⁹

(6) Government-Crown Zellerbach Corporation Ltd. (Authorization of Agreement) Act;⁵⁰

(7) Newfoundland and Labrador Corporation Ltd. (Amendment) Act;⁵¹

(8) The Government-The Flintkote Company-Atlantic Gypsum Limited (Authorization of Agreement) Act;⁵²

(9) Churchill Falls (Labrador) Corporation Limited (Lease) Act;⁵³

(10) The Alexis Watershed (Timber Operations) Act, 1962;⁵⁴

(11) British Newfoundland Corporation Limited (Lower Churchill River Lease) Act.⁵⁵

Fish Ladders

Several private agreements contain provisions requiring the installation of fish ladders or an undertaking by the grantee of water rights not to interfere with the passage of fish, normally salmon. The agreements are confirmed by the following statutes:

45. (1905), 5 Edw. VII, c. 10, s. 7 (Nfld.).

46. (1923), 14 Geo. V, c. 4, Sch., cl. 18 (Nfld.). This Act gives a 99 year lease to an area in the vicinity of Orange Bay on the north east coast.

47. (1927), 18 Geo. V, c. 3; (1932), 22 Geo. V, c. 4 (Nfld.). This gave an exclusive right to catch fish in the fisheries.

48. 1938, No. 4, as amended by 1939, No. 33 (Nfld.). This gives an exclusive right to manufacture herring oil either at inland factories or on factory ships operating within territorial waters for fifteen years.

49. 1943, No. 36 (Nfld.). Cl. 2 of the agreement preserves the right of the public to use the rivers, streams and lakes; cl. 20 specifically reserves fresh fishery rights. This agreement provides for a one year exploration period, a 40 year lease with an option to renew for another 40 years. It covers the drainage areas of the rivers flowing into Sandwich Bay in Labrador.

50. 1958, No. 42, Sch., cl. 12(1). This agreement provides for a two year exploration period and a 99 year lease to the land described in the schedule.

51. 1951, No. 88, s. 8M(c), as enacted by 1959, No. 34 (Nfld.). This agreement provides for a 12 year exploration period and a 99 year lease.

52. 1960, No. 80, Sch. B, cl. 12 (Nfld.). The agreement provides for a 12 year exploration lease and a mining lease for 99 years renewable for a further 99 years.

53. 1961, No. 51, (as renamed by the Sir Winston Churchill Memorial Act, 1965, No. 45) (Nfld.). Cl. 1(h) of the agreement gives the government, its grantees, licensees and permittees the right to go in and out of the upper Churchill watershed to fish. The Act gives the company a 99 year lease.

54. 1962, No. 41, s. 12(b) (Nfld.).

55. 1966-7, No. 73, Sch., cl. 1(h) (Nfld.).

- (1) Pulp and Paper Industry at Deer Lake Act;⁵⁶
- (2) West Coast Power Company Limited (Electricity) Act;⁵⁷
- (3) International Forest Products Limited (Confirmation of Agreement) Act;⁵⁸
- (4) Government-The Union Electric Light and Power Company (Confirmation of Franchise Agreement) Act.⁵⁹

Fish Breeding

The Crown Lands Act authorizes the leasing of waters to breed fish,⁶⁰ and the Trout Hatcheries and Nurseries Act⁶¹ provides that the Lieutenant-Governor in Council may assure to any applicant the waters of any pond to breed fish, but such an assurance cannot be made in respect of any waters forming part of a river set out in the schedule to the Newfoundland Fishery Regulations of Canada.

RIPARIAN RIGHTS

Reference has already been made to the Crown Lands Act and other statutes reserving a strip of land around lakes and ponds and on both sides of a river. The effect is to reserve in the Crown the riparian rights to waters to which such reservations apply. So, too, the reservation in the Crown of the right to the use and flow of water and to divert it retains for the Crown many of the riparian rights.⁶² On the other hand, there are numerous statutes granting the surface of lands, which sometimes include riparian lands, and so would include riparian rights. These will be listed later in discussing rights respecting the beds of water. In addition the particularized sections that follow all affect riparian rights. Finally, there are also numerous government grants and agreement that grant riparian rights or rights to the bed that cannot be discovered by a search through statutory materials.

RIGHT OF ACCESS

Several public and private statutes affect the right of access. The reservation of a strip around waters by the Crown Lands Act⁶³ already mentioned was originally done to assure public access to all waters. Other public statutes affecting the right of access are the Crown Lands (Mines and Quarries) Act⁶⁴ and the Department of Highways Act.⁶⁵ By section 64 of the Crown Lands (Mines and Quarries) Act the holder of a development licence or mining lease relating to a location under water may not construct buildings or carry on works that interfere with the right of a proprietor of adjoining land to access to that land over the water. Section 31 of the Department of Highways Act prohibits any person from

56. (1912), 2 Geo. V, c. 8, Sch., cl. 12 (Nfld.).

57. 1944, No. 58, Sch., cl. 18 (Nfld.).

58. 1953, No. 36, Sch., cl. 12(3) (Nfld.).

59. 1955, No. 44, Sch., cl. 14 (Nfld.).

60. R.S.N., 1952, c. 174, s. 102.

61. 1960, No. 61, ss. 2, 3 (Nfld.).

62. See pp. 309-10.

63. R.S.N., 1952, c. 174, s. 121.

64. 1961, No. 1 (Nfld.).

65. 1966, No. 13 (Nfld.).

encroaching upon or obstructing a highway or a beach or ferry landing or the public way to them.

In most agreements granting lands to private companies or individuals, a specific clause reserves the public right to fish and navigate the waters covered by the grant, including a specific right of ingress and egress. The following statutes confirm agreements containing such reservations:

(1) Newfoundland and Labrador Railway Maintenance and Observation Act;⁶⁶

(2) An Act to Encourage the Manufacture of Pulp and Paper in this Colony;⁶⁷

(3) Newfoundland Power and Paper Company Limited Act;⁶⁸

(4) The Government-Crown Zellerbach Corporation (Authorization of Agreement) Act;⁶⁹

(5) Newfoundland and Labrador Corporation Limited Act;⁷⁰

(6) The Government-Flintkote Company-Atlantic Gypsum Limited (Authorization of Agreement) Act;⁷¹

(7) Churchill Falls (Labrador) Corporation Limited (Lease) Act;⁷²

(8) The Alexis Watershed (Timber Operations) Act, 1962;⁷³

(9) British Newfoundland Corporation Limited (Lower Churchill River Lease) Act.⁷⁴

FLOW AND LEVEL

The general common law rights to a regular flow and level of water are abetted by several general statutory provisions. The Crown Lands Act provides that, unless the Lieutenant-Governor in Council has authorized the construction of a dam to assist in floating logs or for the purposes of electric power development, no person shall construct, alter or replace or commence the construction, alteration or replacement of any dam or carry out any other work for the diversion or storage of water or the alteration of the material flow or rate of flow of any stream, lake or waterway except with the prior written approval of the Lieutenant-Governor in Council.⁷⁵

The Water Resources and Pollution Control Act provides that, apart from rights previously granted, the right to the use and flow of water vests in Her Majesty, and no right to divert water may arise by prescription.⁷⁶ The Water Authority is also given control over the alteration of the natural features of any body of water and the natural movement of water therein.⁷⁷ The Act also requires that any proposed work involving a control dam, river diversion or the alteration

66. (1898), 61 Vict., c. 6, Sch., cl. 19M (Nfld.).

67. (1905), 5 Edw. VII, c. 10, s. 7 (Nfld.).

68. (1923), 13 & 14 Geo. V, c. 1, s. 10 (Nfld.).

69. 1951, No. 88, s. 8M, as enacted by 1959, No. 34, s. 7 (Nfld.).

70. 1958, No. 42, Sch., cl. 12(1) (Nfld.).

71. 1960, No. 80, s. 12, Sch. B, cl. 12 (Nfld.).

72. 1961, No. 51, Sch., cl. 1(g), (h), (c) (see 1965, No. 45) (Nfld.).

73. 1962, No. 41, Sch., cl. 12 (Nfld.).

74. 1966-7, No. 73, Sch., cl. 1 (Nfld.).

75. R.S.N., 1952, c. 174, s. 121B, as enacted by 1957, No. 57 (Nfld.).

76. 1966-7, No. 57, s. 17(1) (Nfld.). [See now the Clean Air, Water and Soil Authority Act, discussed in the Addendum, at pp. 505-6.]

77. *Ibid.*, s. 21(d). [Now the Clean Air, Water and Soil Authority, see Addendum, pp. 505-6.]

of a body of water or the water flow therein must be submitted to the Water Authority and approved by the Minister of Economic Development in writing.⁷⁸

In many cases private companies and municipalities have been authorized to alter the flow and level of waters. Such rights are often inherent in the grant of other rights. The right to use lakes or streams for municipal water supply, to build dams, to divert watercourses, to flood and to affect the regular flow and level of bodies of water are all interrelated and in many cases connected with some particular activity such as the production of pulp and paper, electric power or mining. Some agreements include an obligation on the part of the grantee to pay compensation for damages inflicted by flooding.⁷⁹ More recent agreements reflect an attempt to specifically protect the rights of downstream proprietors by prohibiting interference with the downstream flow of water without their consent.⁸⁰ Rights conferred by agreement between the government and private persons, whether or not confirmed by statute, and granted prior to the enactment of the Water Resources and Pollution Control Act, are apparently not affected by the provisions of that statute relating to the flow and level of waters in the province.⁸¹ The following statutes incorporate agreements expressly authorizing interferences with the regular flow and level of water:

- (1) Pulp and Paper Industry at Deer Lake Act;⁸²
- (2) Agreement between Government and International Paper of Newfoundland Limited Act;⁸³
- (3) St. John's Housing Corporation Act;⁸⁴
- (4) The Government-Crown Zellerbach Corporation (Authorization of Agreement) Act;⁸⁵
- (5) Newfoundland and Labrador Corporation Limited (Amendment) Act;⁸⁶
- (6) Labrador Mining and Exploration Company Limited Water Power (Clarification and Revision) Act;⁸⁷
- (7) Churchill Falls (Labrador) Corporation Limited (Lease) Act;⁸⁸
- (8) British Newfoundland Corporation Limited (Lower Churchill River Lease) Act.⁸⁹

78. *Ibid.*, s. 27. [Now the Minister of Mines, Agriculture and Resources under the Clean Air, Water and Soil Authority, see Addendum, p. 505.]

79. Agreement between Government and International Paper of Newfoundland Limited Act, (1927), 17 & 18 Geo. V, c. 4, Sch., cl. 5 (Nfld.).

80. Churchill Falls (Labrador) Corporation Limited (Lease) Act, 1961, No. 51, Sch., cl. 2(d), as renamed by 1965, No. 45; British Newfoundland Corporation Limited (Lower Churchill River Lease) Act, 1966-7, No. 73, Sch., cl. 2(d) (Nfld.). (This grants the right to regulate the flow of the Lower Churchill but not to the detriment of downstream owners without their consent.)

81. 1966-7, No. 57, s. 17(2) (Nfld.). [See now the Clean Air, Water and Soil Authority Act, discussed in the Addendum, at pp. 505-6.]

82. (1912), 2 Geo. V, c. 8 (Nfld.). Section 2 gives the right to raise the level of Deer Lake and Grand Lake.

83. (1927), 17 & 18 Geo. V, c. 4, Sch., cl. 5 (Nfld.).

84. R.S.N., 1952, c. 80, s. 18. This authorizes alteration of flow within the housing area.

85. 1958, No. 42 (Nfld.). Cl. 18 of the agreement gives the right to regulate the flow of waters that the corporation deems necessary or desirable.

86. 1959, No. 34 (Nfld.). S. 8A gives the corporation the right to regulate flow.

87. 1961, No. 50, s. 4 (Nfld.). Para. 6 of the licence gives the right to regulate the flow of Menehik waters.

88. 1961, No. 51, Sch., cl. 2(d) (see 1965, No. 45) (Nfld.).

89. 1966-7, No. 73, Sch., cl. 2(d) (Nfld.). This grants the right to regulate the flow of the Lower Churchill but not to the detriment of downstream properties without their consent.

POLLUTION

The two principal statutes relating to pollution and its control, the Water Resources and Pollution Control Act⁹⁰ and the Water Protection Act,⁹¹ are discussed in Chapter Six. Other statutes containing provisions respecting pollution, such as the Local Government Act,⁹² the Department of Health Act,⁹³ the Health and Public Welfare Act,⁹⁴ the Urban and Rural Planning Act,⁹⁵ the City of Corner Brook Act,⁹⁶ the Water and Sewerage Corporation of Greater Corner Brook Act⁹⁷ and the Building Standards Act⁹⁸ are also dealt with in Chapter Six.

In addition to these statutes there are other general statutes, as well as agreements with private companies and individuals, that contain provisions respecting pollution. The Crown Lands Act requires the owner of every pulp, paper or saw mill operating near public waters, bays, creeks or harbours to take precautions to prevent sawdust or other noxious materials from entering the water; a penalty of \$100 is imposed for any violation.⁹⁹ As an additional precaution, the Minister of Mines, Agriculture and Resources, with the approval of the Lieutenant-Governor in Council, may regulate the disposal of waters under section 14(b) of the Saw Mills Act.¹⁰⁰ Section 7 of the Fish, Oil and Meal Act¹⁰¹ authorizes the Newfoundland Fisheries Board, with the approval of the Lieutenant-Governor in Council, to make rules to prevent pollution of waters as a result of the manufacturing of herring or caplen oil or meal.

Several statutes incorporating municipalities or water and sewage companies contain provisions permitting the corporation to acquire Crown lands as well as private lands surrounding the water supply source and make regulations to prevent pollution. These include:

- (1) The Water and Sewerage Corporation of Greater Corner Brook Act,¹⁰²
- (2) Botwood Water Corporation Act;¹⁰³
- (3) City of St. John's Act.¹⁰⁴

The Rural District of Placentia Act transfers possession and control of Crown lands within 30 yards of the water supply to the Lieutenant-Governor in Council to prevent pollution.¹⁰⁵ The Lieutenant-Governor in Council is also

90. 1966-7, No. 57 (Nfld.).

91. 1964, No. 36 (Nfld.).

92. 1966, No. 31, as amended (Nfld.).

93. 1965, No. 32, as amended (Nfld.).

94. R.S.N., 1952, c. 51, as amended.

95. 1965, No. 28 (Nfld.).

96. 1958, No. 25, as amended (Nfld.).

97. 1951, No. 79 (Nfld.).

98. 1955, No. 38, as amended (Nfld.).

99. R.S.N., 1952, c. 174, s. 85.

100. 1959, No. 75 (Nfld.).

101. R.S.N., 1952, c. 210

102. 1951, No. 79, s. 35 (Nfld.).

103. 1952, No. 36, s. 17 (Nfld.).

104. 1952, c. 87, ss. 104-6 (Nfld.).

105. 1953, No. 51 (Nfld.).

authorized to make regulations regarding pollution in Larkin's Pond under the Larkin's Pond Reservoir Act.¹⁰⁶

In some statutorily confirmed agreements between the government and companies and individuals, the grantees of rights expressly undertake to prevent pollution as a result of their operations. Such agreements appear in the following statutes:

(1) Lake Melville Development Company Act;¹⁰⁷

(2) The Government-Golden Eagle Refining Company of Canada Limited (Agreement) Act;¹⁰⁸

(3) The Government-Pelly-Shaw Newfoundland Limited (Authorization of Quarry Lease) Act.¹⁰⁹

The Ore-Treatment Tailings (Labrador) Disposal Act¹¹⁰ prevents persons in certain areas in Wabush Lake and its extension towards Shabogamo Lake and in the Flora Lake Basin whose lands are adversely affected because of the pollution of adjacent waters resulting from the dumping of ore-treatment tailings from obtaining an injunction. The Act declares that any owner, occupier or user of land, whose title was acquired prior to the passing of the Act and whose land has been injuriously affected by the disposal of ore-treatment tailings into adjoining waters or by the penetration of the waters by the tailings, is not entitled to an injunction or any other remedy that would stop or interrupt the dumping of ore-treatment tailings. However, the injured party is not precluded from obtaining any other remedy to which he is legally entitled, such as money damages. Persons acquiring an interest in land after the passing of the Act are, on the other hand, completely prohibited from bringing legal action of any kind.

RIGHTS RELATING TO USE

Consumption

The general powers of municipal governments relating to municipal water supply, including the right to lay pipes, to alter or direct any watercourse, and to acquire an adequate source of supply, are contained in the Local Government Act¹¹¹ and have already been dealt with in examining municipal structures.¹¹² The powers of the Minister of Municipal Affairs under the Housing Act¹¹³ and the Urban and Rural Planning Act¹¹⁴ relating to the supply of water for domestic purposes were also dealt with there. Several larger communities like the City of

106. 1956, No. 34, s. 56 (Nfld.).

107. 1939, No. 29, s. 19 (Nfld.).

108. 1960, No. 16, Sch., cl 6(2) (Nfld.).

109. 1966, No. 38, Sch., cl. 9 (Nfld.).

110. 1965, No. 31 (Nfld.).

111. 1966, No. 31, as amended (Nfld.).

112. See pp. 169-71.

113. 1966, No. 87 (Nfld.).

114. 1965, No. 28 (Nfld.).

St. John's¹¹⁵ and the City of Corner Brook¹¹⁶ have their own statutes containing similar provisions respecting the consumption of water for drinking purposes.

There are apparently still in existence a few water companies incorporated for the purpose of supplying water to individual towns. The statutes authorizing their operations are, in general, very vague and lack any reference to rights in specific bodies of water for specific periods of time. Normally they do not contain an express right to divert watercourses. The assets of the Carbonear Water Company were vested in the Crown in 1957 and the Ministers of Municipal Affairs and Supply were designated and empowered to exercise in the name of the company all the rights held by the company or the directors.¹¹⁷ The Botwood Water Corporation Act¹¹⁸ provides for the transfer of all assets to the town council if the Lieutenant-Governor in Council approves. The Harbour Grace Water Company Incorporation Act¹¹⁹ permits the Lieutenant-Governor in Council to declare that the waterworks and all other property and assets be vested in the Crown in right of the province.

Electric Power Development

Electric power development has been partially considered in dealing with the electric power commissions in Chapter Six. As there noted, there are also a number of private electric light companies authorized by statute for specific periods to use certain waters to generate electric power. In many cases the lease period appears to have expired. The relevant companies are as follows:

- (1) United Towns Electric Company,¹²⁰
- (2) Twillingate Electrical Company of Newfoundland;¹²¹
- (3) Northern Electric Light and Power Company,¹²²
- (4) Union Electric Light and Power Company,¹²³
- (5) Public Service Electric Co., Ltd.,¹²⁴
- (6) Holyrood Pond Fisheries Limited;¹²⁵

115. R.S.N., 1952, c. 87, as amended.

116. 1958, No. 25, as amended (Nfld.).

117. 1957, No. 4 (Nfld.).

118. 1952, No. 36, as amended (Nfld.).

119. 1951, No. 77 (Nfld.).

120. (1902), 2 Edw. VII, c. 8; (1914), 4 Geo. V, c. 8; (1924), 15 Geo. V, c. 4; (1929), 20 Geo. V., cc. 4, 47; 1957, No. 37 (Nfld.) (see also An Act to Incorporate the Conception Bay Electric Company (1913), 3 Geo. V, c. 4; (1914), 4 Geo. V, c. 7; (1919), 9 & 10 Geo. V, c. 13). The Act gave the company the exclusive right to use North East Brook at Lawn for a period of 50 years.

121. (1908), 8 Edw. VII, c. 9, s. 16 (Nfld.). The Act gave the company the right to use Kayers Pond, Wild Cove Pond, Robins Cove Pond, White Hills Pond and rivers flowing inland for a period of 50 years.

122. (1913), c. Geo. V, c. 5, s. 16 (Nfld.). The Act gave the company the right to use Drummonds Long Pond and the rivers flowing in and out of it for a period of 50 years.

123. (1916), 6 Geo. V, c. 1; 1944, No. 3; 1955, No. 44 (Nfld.).

124. (1917), 8 Geo. V, c. 4, s. 1 (Nfld.). The Act gave the company the exclusive right to use Heart's Content Stream and its tributaries for a period of 50 years. The company was amalgamated with the United Towns Electric Company by 1957, No. 37.

125. (1927), 18 Geo. V, c. 3, Sch., cl 7; (1932), 22 Geo. V, c. 4 (Nfld.). The Act applies to the Deer Pond and Deer Pond River and other tributaries for a period of 30 years.

- (7) Clarenceville Light and Power Company Limited;¹²⁶
- (8) Wabana Light and Power Company Limited;¹²⁷
- (9) West Coast Power Company Limited.¹²⁸

In 1957 the United Towns Electric Company, Limited was amalgamated with its subsidiaries, the Public Service Electric Company, the West Coast Power Company, Limited and the Wabana Power Company, Limited and acquired the water power rights previously held by those companies.¹²⁹

In addition to the foregoing, there are a number of private agreements with corporations under which the government has undertaken to grant to the corporation the right to develop whatever water powers may be reasonably necessary for the company's operations. The sites are determined by the parties by mutual agreement at a later date and there is normally no specific reference to particular waters. The right to develop water powers is tied to the development licence which can be applied for and, if granted, permits the company to apply for a mining lease which is issued with the right to develop water power included. In many cases, the time within which the company is given the exclusive right to select areas for development and in which water power rights will be granted seems to have expired.¹³⁰ The following companies and individuals have concluded agreements with the government:

- (1) Terra Nova Sulphite Company;¹³¹
- (2) Pulp and Paper Corporation;¹³²
- (3) Malcolm Joseph Mooney;¹³³
- (4) Anglo-Newfoundland Development Company;¹³⁴
- (5) Labrador Mining and Exploration Company Limited;¹³⁵
- (6) Labrador Railway Company;¹³⁶

126. (1933), 23 & 24 Geo. V, c. 2, s. 1 (Nfld.). The Act gives a right to dam. It applies to the brook flowing out of Lake of Woods near Clareville, Trinity Bay.

127. 1943, No. 54; 1949, No. 1. This extends for a period of 20 years. There is nothing respecting use of water.

128. 1944, No. 58, Sch., cl. 3 (Nfld.). This extends for a period of 50 years. No body of water is specified but the power to dam is implied.

129. 1957, No. 37 (Nfld.).

130. It is conceivable that a company may have selected certain areas before the exploration period expired and applied for a mining lease which would include a grant of water power. There would thus be a valid lease of water powers even though the exploration period has terminated. However, these leases would apparently be recorded in the Department of Mines, Agriculture and Resources (see Crown Lands Act, R.S.N., 1952, c. 174, s. 116) but a search has revealed no such lease.

131. (1920), 11 Geo. V, c. 22, Sch., cl. 2 (Nfld.). The Act leases the Terra Nova River and tributaries for 99 years. See also (1921), 12 Geo. V, c. 7; (1925), 15 Geo. V, c. 12 (Nfld.).

132. (1921), 12 Geo. V, c. 9, ss. 5, 14 (Nfld.).

133. (1923), 14 Geo. V, c. 4, Sch., cl. 2 (Nfld.).

134. (1927), 18 Geo. V, c. 6; 1940, No. 21; 1949, No. 25, Sch. cl. 11; 1959, No. 31; 1964, No. 37 (Nfld.). This involves a lease of mill site and water power in South East Brook in the South West Arm of New Bay for 21 years.

135. 1938, No. 41, as amended by 1961, No. 50 (Nfld.). The Act involves the Menehik Lakes and Ashuanipi River.

136. 1948, No. 3, s. 10 (Nfld.) allows the company to buy, lease or take by transfer or assignment water rights granted to the Labrador Mining and Exploration Company for railway operations.

- (7) Newfoundland and Labrador Corporation;¹³⁷
- (8) Falconbridge Nickel Mines Limited;¹³⁸
- (9) Newfoundland Fluorospas Limited;¹³⁹
- (10) Frobisher Limited;¹⁴⁰
- (11) British Newfoundland Exploration Limited;¹⁴¹
- (12) M. James Boylen;¹⁴²
- (13) E. T. Donaldson and A. W. Knight;¹⁴³
- (14) Advocate Mines Limited;¹⁴⁴
- (15) Golden Eagle Refining Company of Canada Limited;¹⁴⁵
- (16) O'Brien Gold Mines Limited;¹⁴⁶
- (17) Consolidated Rambler Mines Limited;¹⁴⁷
- (18) Leitch Gold Mines Limited;¹⁴⁸
- (19) Grand Roy Mines Limited;¹⁴⁹
- (20) Mokta (Canada) Ltd.¹⁵⁰

Several companies have rights to use water power to develop electric energy that were not extinguished by the Newfoundland and Labrador Power Commission (Water Power) Act of 1965.¹⁵¹ Bowaters has a 99 year lease of water powers on the Humber River and Junction Brook as well as on the Gander River at the Big Chute and its tributaries and all streams falling into Bonavista Bay from Middle Brook to Indian Bay Brook.¹⁵² The British Newfoundland Corporation, Limited still retains water rights in Labrador^{152a} and has been granted a 99 year lease to the exclusive use of all usable waters of the Lower Churchill River, within the catchment area.¹⁵³

Churchill Falls Power Corporation received from British Newfoundland Corporation an assignment of its rights to the Upper Churchill (then called Hamilton) River and was granted a 99 year lease in 1961 to all usable waters upstream of 63° 40' west of Greenwich and within the catchment area of the Churchill River upstream of that point.¹⁵⁴

137. 1951, No. 53; 1959, No. 34; 1965, No. 53, s. 7. The 1965 amendment contains an undertaking to grant the right to develop such water powers on the Eagle River, the Kenamu Rivers and streams contiguous thereto and streams contiguous to the Chateau Bay area in Labrador.

138. 1951, No. 90, Sch., cl. 10 (Nfld.).

139. 1953, No. 35, Sch., cl. 10 (Nfld.).

140. 1955, No. 27, Sch., cl. 10 (Nfld.). [For a recent amendment to the agreement, see Addendum p. 508].

141. 1957, No. 28 (Nfld.). Sch., cl. 9(a) (Nfld.), as amended.

142. 1957, No. 62, Sch., cl. 11(a) (Nfld.). See also 1959, No. 55, Sch., cl. 11(a) (Nfld.), respecting the Notre Dame Bay area; see also 1964, No. 12 Sch., cl. 11 (Nfld.).

143. 1957, No. 77, Sch., cl. 11(a) (Nfld.).

144. 1959, No. 15, s. 11 (Nfld.).

145. 1960, No. 16, Sch., cl. 6(1) (Nfld.).

146. 1963, No. 36, Sch., cl. 11 (Nfld.).

147. 1964, No. 3, Sch., cl. 11 (Nfld.).

148. 1964, No. 4, Sch., cl. 11 (Nfld.).

149. 1964, No. 11, Sch., cl. 11 (Nfld.).

150. 1965, No. 6, Sch., cl. 11(a) (Nfld.).

151. 1965, No. 21 (Nfld.).

152. 1938, No. 53, ss. 17, 18 (Nfld.).

152a. 1953, No. 63; 1966-7, No. 72 (Nfld.).

153. 1966-7, No. 73, Sch., cl. 1 (Nfld.).

154. 1961, No. 51, Sch., cl. 1; see 1965, No. 45 (Nfld.).

Pulp and Paper

Several statutes grant private companies a supply of pure, clean water for the manufacture of pulp and paper. These statutes are:

(1) Agreement between Government and International Paper Company of Newfoundland Limited Act;¹⁵⁵

(2) The Government-Crown Zellerbach Corporation (Authorization of Agreement) Act;¹⁵⁶

(3) Newfoundland and Labrador Corporation Limited (Amendment) Act, 1959.¹⁵⁷

Several other statutes, already referred to in relation to flow and level, permit pulp and paper manufacturers to regulate the flow of certain bodies of water. These are:

(1) Pulp and Paper Company at Deer Lake Act;¹⁵⁸

(2) Agreement between Government of Newfoundland and International Paper Company of Newfoundland Limited Act;¹⁵⁹

(3) The Government-Crown Zellerbach Corporation (Authorization of Agreement) Act.¹⁶⁰

Other Industrial Uses

General control over the use of water for industrial or commercial purposes is exercised by the Minister of Economic Development under the provisions of the Water Resources and Pollution Control Act.¹⁶¹

The Electric Reduction Company of Canada, Ltd. (Agreement) Act contains an undertaking by the government to supply a maximum of 15 million gallons of fresh water per day from Rattling Brook, Long Harbour, for plant operations involving ore pelletizing and the production of phosphates at Long Harbour, Placentia Bay.¹⁶² The company is also given an option to a lease involving the right to take not more than 15 million gallons of water from Rattling Brook.

An old statute, the Dry or Graving Dock Act, provides for the use of water in connection with the dry dock at St. John's.¹⁶³

Irrigation

The Water Resources and Pollution Control Act empowers the Minister of Economic Development to make regulations controlling the use of water for irrigation purposes.¹⁶⁴

155. (1927), 18 Geo. V, c. 4, Sch., cl. 9(d) (Nfld.).

156. 1958, No. 42, Sch., cl. 18(2) (Nfld.).

157. 1959, No. 34, Sch., cl. 8A(17) (Nfld.).

158. (1912), 2 Geo. V, c. 8 (Nfld.).

159. (1927), 18 Geo. V, c. 4, cl. 9(d) (Nfld.).

160. 1958, No. 42 (Nfld.).

161. 1966-7, No. 57 (Nfld.). [Now the Minister of Mines, Agriculture and Resources under the Clean Air, Water and Soil Authority Act; see Addendum, p. 505].

162. 1966-7, No. 49, Sch., cl. 25 (Nfld.).

163. (1883), 46 Vict., c. 5, s. 6 (Nfld.).

164. 1966-7, No. 57, s. 20(1) (b) (Nfld.). [Now the Minister of Mines, Agriculture and Resources under the Clean Air, Water and Soil Authority Act; see Addendum, p. 505].

Rights to Run Cables Across Waterways

Some companies have been granted statutory rights to erect and maintain cables across waterways on condition that the public right to navigate the waters is not impeded. These statutes are:

(1) New York, Nfld. and London Telegraph Co. Incorporation Act;¹⁶⁵

(2) The Government-The Union Electric Light and Power Company (Confirmation of Franchise) Agreement Act.¹⁶⁶

RIGHTS RESPECTING THE BED

General

Reference has already been made to the provisions of the Water Resources and Pollution Control Act respecting the ownership of the beds of water.¹⁶⁷ As noted, apart from lands already granted, the beds of waters vest in the province. Even before this Act the reservations to the Crown under the Crown Lands Act¹⁶⁸ of a strip of land adjoining waters had the effect of retaining for the province the beds in such waters.

Grants of Water Lots

Under section 73 (2) of the Crown Lands (Mines and Quarries) Act and its predecessors, many companies have been granted the right to obtain from the government surface Crown lands reasonably necessary for company operations, including wharves, piers, docks or other shipping facilities.¹⁶⁹ Although referred to as surface grants they could conceivably include water as well. A number of statutes also provide for grants of land that may comprise the beds of water. These include the following:

(1) Pulp and Paper Industry at Deer Lake Act;¹⁷⁰

(2) Pulp and Paper Corporation Contract Act;¹⁷¹

(3) Malcolm Joseph Mooney Agreement with Government Act;¹⁷²

(4) Holyrood Pond Fisheries Limited Agreement Act;¹⁷³

(5) Confirmation of Agreement between the Government and Labrador Mining and Exploration Company Limited Act;¹⁷⁴

(6) Labrador Railway Act;¹⁷⁵

(7) Anglo Newfoundland Development Co. Ltd.-Buchans (Exploration and Development) Act;¹⁷⁶

165. (1854), 17 Vict., c. 2, as amended (Nfld.).

166. 1955, No. 44, s. 11(1) (Nfld.).

167. 1966-7, No. 57, s. 17 (Nfld.). [See now the Clean Air, Water and Soil Authority Act, discussed in the Addendum, at pp. 505-6.].

168. R.S.N., 1952, c. 174, s. 121.

169. 1961, No. 1; the section was enacted by 1959, No. 39, s. 8 (Nfld.).

170. (1912), 2 Geo. V, c. 8, Sch., cl. 5 (Nfld.).

171. (1921), 12 Geo. V, c. 9, ss. 15, 17 (Nfld.).

172. (1923), 14 Geo. V, c. 4, Sch., cl. 8 (Nfld.).

173. (1927), 18 Geo. V, c. 3, Sch., cl. 3 (Nfld.).

174. 1944, No. 47, s. 7 (Nfld.).

175. 1948, No. 3, s. 2(c) (Nfld.).

176. 1949, No. 25, Sch., cl. 13 (Nfld.).

- (8) Falconbridge Nickel Mines Limited (Agreement) Act;¹⁷⁷
- (9) The Government-Newfoundland Fluorspar (Agreement) Act, 1953;¹⁷⁸
- (10) International Forest Products (Agreement) Limited (Confirmation of) Act, 1953;¹⁷⁹
- (11) The Government-Canadian AMCO Limited (Agreement) Act, 1953;¹⁸⁰
- (12) The Government British Newfoundland-N. M. Rothschild Corporation Limited (Confirmation of Agreement) Act, 1953;¹⁸¹
- (13) Newfoundland and Labrador Corporation Limited (Amendment) Act;¹⁸²
- (14) Frobisher Limited (Confirmation of Agreement) Act, 1955;¹⁸³
- (15) M. James Boylen (Confirmation of Agreement) Act;¹⁸⁴
- (16) Mortier Bay Development Act;¹⁸⁵
- (17) Advocate Mines Limited Act;¹⁸⁶
- (18) M. James Boylen (Authorization of Agreement) Act;¹⁸⁷
- (19) The Government-Flintkote-Atlantic Gypsum Limited (Authorization of Agreement) Act;¹⁸⁸
- (20) Labrador Mining and Exploration Company Limited Water Power Licence (Clarification and Revision Agreement) Act;¹⁸⁹
- (21) Churchill Falls Power Corporation Limited (Lease) Act;¹⁹⁰
- (22) The Government-British Newfoundland Exploration Limited (Authorization of Agreement) Act;¹⁹¹
- (23) O'Brien Gold Mines Limited (Confirmation of Agreement) Act;¹⁹²
- (24) Consolidated Rambler Mines Limited (Amendment) Act;¹⁹³
- (25) Leitch Gold Mines Limited (Agreement) Act;¹⁹⁴
- (26) Grandroy Mines Limited (Agreement) Act;¹⁹⁵
- (27) M. James Boylen (Agreement) Act;¹⁹⁶

177. 1951, No. 90, Sch., cl. 12 (Nfld.).

178. 1953, No. 35, Sch., cl. 12 (Nfld.).

179. 1953, No. 36, Sch., cl. 12 (Nfld.).

180. 1953, No. 37, Sch., cl. 11 (Nfld.).

181. 1953, No. 63, Sch., cl. 11 (Nfld.).

182. 1953, No. 64, s. 81 (Nfld.).

183. 1955, No. 27, Sch., cl. 12 (Nfld.).

184. 1955, No. 43, Sch., cl. 14 (Nfld.).

185. 1958, No. 43, Sch., cl. 5 (Nfld.).

186. 1959, No. 15, Sch., cl. 13(a) (Nfld.).

187. 1959, No. 55, Sch., cl. 14 (Nfld.).

188. 1960, No. 80, Sch., cl. 16 (Nfld.).

189. 1961, No. 50 (Nfld.).

190. 1961, No. 51, Sch., cl. 7; see 1965, No. 45 (Nfld.).

191. 1962, No. 17, Sch., cl. 11 (Nfld.).

192. 1963, No. 36, Sch., cl. 13 (Nfld.).

193. 1964, No. 3, Sch., cl. 13 (Nfld.).

194. 1964, No. 4, Sch., cl. 13 (Nfld.).

195. 1964, No. 11, Sch., cl. 13 (Nfld.).

196. 1964, No. 12, Sch., cl. 13 (Nfld.).

- (28) The Nalco (Partition Agreement) Act;¹⁹⁷
- (29) Mokta (Canada) Ltée (Agreement) Act;¹⁹⁸
- (30) Newfoundland and Labrador Power Commission Act;¹⁹⁹
- (31) Newfoundland and Labrador Rural Electricity Act;²⁰⁰
- (32) Petroleum and Natural Gas Act;²⁰¹
- (33) Canadian Javelin Limited (Agreement) Act;²⁰²
- (34) Big Nama Creek Mines (Agreement) Act;²⁰³
- (35) Patino Mining Corporation (Agreement) Act;²⁰⁴
- (36) Cominco Ltd. (Agreement) Act.²⁰⁵

Reference should also be made to the water lots listed in Chapter Twenty Three.

Right to Build Dams

There are several statutory provisions controlling the building of dams. Section 21 of the Water Resources and Pollution Control Act places control over the alteration of the natural features of any body of water therein (by damming, for example), in the hands of the Water Authority.²⁰⁶ Section 27 requires anyone contemplating the construction of a control dam to submit plans and information to the Authority and prohibits the construction unless approved by the Minister in writing.

The Crown Lands Act requires that lands forming part of the bed of any lake, river, stream or other watercourse required for the construction of works or for their operation be set out in the interim or final licence separately from lands required for other purposes, and specifically denies that any licence conveys an exclusive right in or to the use or occupancy of the lands.²⁰⁷ Sections 57, 84 and 121B control the construction of dams for hydro-electric projects or in connection with the floating of timber.²⁰⁸

The right to construct dams has been specifically granted in the following cases:

- (1) Malcolm Joseph Mooney Agreement with Government Act;²⁰⁹
- (2) Agreement between Government and International Paper of Newfoundland, Limited Act;²¹⁰
- (3) West Coast Power Company Limited (Electricity) Act;²¹¹

197. 1964, No. 78, Sch. App., cl. 6 (Nfld.).

198. 1965, No. 6, Sch., cl. 13 (Nfld.).

199. 1963, No. 20, s. 34(4) (Nfld.).

200. 1965, No. 51, s. 35(2) (Nfld.).

201. 1965, No. 56, Sch., cl. 12 (Nfld.).

202. 1966, No. 12, Sch., cl. 12 (Nfld.).

203. 1966-7, No. 16, Sch., cl. 12 (Nfld.).

204. 1966-7, No. 17, Sch., cl. 12 (Nfld.).

205. 1966-7, No. 20, Sch., cl. 12 (Nfld.).

206. 1966, No. 57 (Nfld.). [See now the Clean Air, Water and Soil Authority Act, discussed in the Addendum, at pp. 505-6].

207. R.S.N., 1952, c. 174, s. 46.

208. *Ibid.*; s. 121B was enacted by 1957, No. 37, s. 2 (Nfld.).

209. (1923), 14 Geo. V, c. 4 (Nfld.). This deals with Orange Bay.

210. (1927), 17 Geo. V, c. 4, Sch., cl. 9(d) (Nfld.).

211. 1944, No. 58 (Nfld.). The power to dam is implied in s. 18.

- (4) Water and Sewerage Corporation of Greater Corner Brook Act;²¹²
- (5) Newfoundland and Labrador Corporation Limited Act;²¹³
- (6) The Government-Golden Eagle Refining Company of Canada Limited (Agreement) Act, 1960;²¹⁴
- (7) Labrador Mining and Exploration Company Ltd., Water Power Licence (Clarification and Revision) Act;²¹⁵
- (8) Newfoundland and Labrador Power Commission Act;²¹⁶
- (9) Newfoundland and Labrador Corporation, Ltd. (Amendment) Act, 1965;²¹⁷
- (10) Electric Reduction Company of Canada Limited (Agreement) Act;²¹⁸
- (11) British Newfoundland Corporation Limited (Lower Churchill River Lease) Act.²¹⁹

212. 1951, No. 79, s. 33 (Nfld.).

213. 1959, No. 34 (Nfld.). The company was given until 1970 to apply for a 99 year lease renewable for a further 99 years, with the right to erect dams for logging (cls. 16 and 17), and to ensure a supply of clean water.

214. 1960, No. 16 (Nfld.).

215. 1961, No. 50, s. 6 (Nfld.). This deals with Menehik Lake.

216. 1965, No. 20 (Nfld.).

217. 1965, No. 53, s. 7 (Nfld.). This Act amends 1951, No. 88, s. 85(iv) and provides for granting the right to construct dams on Kenamic River for logging purposes.

218. 1966-7, No. 49, Sch., cl. 25 (Nfld.). No specific area is mentioned but it relates to the general area of Long Harbour, Placentia Bay. The Act gives a lease for 50 years.

219. 1966-7, No. 73, Sch., cl. 2 (Nfld.). [For a recent amendment to this agreement, see Addendum, p. 508].

PART IV

Interprovincial Rivers

CHAPTER SIXTEEN

Interprovincial Rivers

By Gerard V. La Forest

INTRODUCTION

The law of interprovincial rivers has largely been unexplored judicially, though there is now considerable literature on the subject.¹ In view of the few decided cases touching the matter, definitive answers to the many complex legal problems that may arise in connection with their development cannot be expected. The major purpose of this chapter is to attempt to identify the problems.

To some extent, of course, the problems resemble those arising in connection with international rivers, but there are important differences. In the first place, unlike states in international law, the provinces constitute separate legislative areas for limited purposes only; for other purposes interprovincial boundaries are irrelevant because all the provinces are comprised in the larger legislative area within federal jurisdiction. Thus laws relating to navigation and fishing need not, **and usually do not**, take into consideration whether the affected waters are situate wholly within the confines of a province or form part of an interprovincial or international river.

In the second place, there is a difference in the applicable law. The patterns of reciprocal accommodations of power that constitute international law may or may not be suitable to, or be adopted by courts in dealing with interprovincial rivers.

As in the case of international rivers, however, it may be useful to classify interprovincial rivers into (1) boundary rivers, i.e. rivers forming a part of an interprovincial boundary, and (2) transboundary rivers, which for our purposes will include not only rivers flowing across an interprovincial boundary, but rivers flowing into interprovincial boundary waters as well.

1. See John J. Connolly, Q.C., "The Problem of the South Saskatchewan River Development Project" and H. Carl Goldenberg, Q.C., "Legal Aspects of the South Saskatchewan River Development Project", Memoranda in the *Report of the Royal Commission on the South Saskatchewan River Project* (Ottawa, 1952), pp. 159 and 168, respectively; Per Gissvold, *A Survey of the Law of Water in Alberta, Saskatchewan and Manitoba* (Ottawa, 1959), c. 18; K.C. Mackenzie, "Interprovincial Rivers in Canada: A Constitutional Challenge" (1961), 1 U.B.C. Law Rev. 499; Bora Laskin, "Jurisdictional Framework for Water Management" in *Resources For Tomorrow, Conference Background Papers* (Ottawa, 1962), vol. I, p. 211, at pp. 221-3; Leo McGrady, "Jurisdiction for Water Resources Development" (1967), 2 Man. Law Jo. 219, at pp. 241-3; Kenneth Hanssen, "Constitutional Problems of Interprovincial Rivers" (1968), *Research Report No. 2, Agassiz Center for Water Studies*, Univ. of Man.; Dale Gibson, "The Constitutional Context of Canadian Water Planning" (1969), 7 Alta. Law Rev. 71 at pp. 76-81; Martin Zimmerman, "Interprovincial Water Use Law in Canada: Suggestions and Comparisons" (1969), *Research Report No. 3, vol. 2, Agassiz Center for Water Studies*; for interprovincial boundary waters, see A.F.N. Poole, "The Boundaries of Canada" (1964), 42 Can. Bar Rev. 100, esp. at pp. 102-3; Henry Landis, "Legal Controls of Pollution in the Great Lakes Basin" (1970), 48 Can. Bar Rev. 66, at pp. 130, 136-7, 144, 147.

BOUNDARY RIVERS

Boundary rivers can give rise to similar types of problems as transboundary rivers, for example the diversion of waters on one side to the detriment of land on the other side. Examination of such problems will be made in relation to transboundary waters. The major problem peculiar to boundary waters is the location of the boundary where a river forms the boundary. There are several such rivers in the Atlantic provinces. By virtue of 19th century British statutes, part of the Quebec-New Brunswick boundary runs down the centre of the Pata-pedia River from the point where that river meets the 48th degree of latitude to the Restigouche River, thence down the centre of the latter river to its mouth in the Bay des Chaleurs.² What is meant by the "centre of the stream" gives rise to difficulties. It probably refers to the *ad medium filum aquae* rule of the common law, i.e. the centre line between the two banks. The expression is often used in speaking of the common law,³ and, so far as the British Parliament which enacted this definition was concerned, this was a domestic matter. One writer, A.F.N. Poole, has suggested, on the other hand, that the expression refers to the thalweg, i.e. the middle channel of the river, by analogy to the rule regarding international rivers.⁴ But the rule regarding international rivers was devised to assure the countries on both sides access to the navigable channel of the river.⁵ This consideration is irrelevant to interprovincial rivers because the regulation of navigation is vested in the federal Parliament. By virtue of the statutes already mentioned islands in these rivers belong to New Brunswick. Presumably the boundary in such places would run in the channel between the island and the Quebec shore; otherwise New Brunswick islands would be bounded by Quebec waters.

The boundary between New Brunswick and Nova Scotia is also partially defined in terms of the Missiquash and Tidnish Rivers. This boundary at the relevant points runs as follows.

Commencing at the mouth of the Missiquash River in Cumberland Bay, and thence following the several courses of said river to a post near Black Island; thence north fifty-four degrees twenty-five minutes east, crossing the south end of Black Island, two hundred and eighty-eight chains, to the northerly angle of Trenholm Island; thence north thirty-seven degrees east eighty-five chains and eighty-two links, to a post; thence north seventy-six degrees east forty-six chains and twenty links to the portage; thence south sixty-five degrees forty-five minutes east three hundred and ninety-four chains and forty links, to Tidnish Bridge; thence following the several courses of Tidnish River along its northern upland bank to its mouth; thence following the north-westerly channel to the deep waters of the Bay Verte.⁶

Here, too, Poole suggests that "the several courses" of the Missiquash River refers to the thalweg,⁷ but again this is an expression that the courts have frequently

2. (1851), 14 Vict. c. 63, as amended by (1857), 20 & 21 Vict., c. 34 (Imp.). Both these statutes were repealed by British Statute Law Revision Acts (1955), 7 & 8 Eliz. II, c. 68; (1956), 8 & 9 Eliz. II, c. 56 (Imp.), but this does not affect the boundary.

3. See p. 242.

4. A.F.N. Poole, "The Boundaries of Canada" (1964), 42 Can. Bar Rev. 100, at p. 102.

5. See *New Jersey v. Delaware* (1934), 291 U.S. 361.

6. This boundary was established by a British Order in Council of 1784, and was later accepted by New Brunswick (1858), 21 Vict., c. 14 (N.B.) and Nova Scotia (1859), 22 Vict., c. 9 (N.S.); the boundary is recited in C.S.N.B., 1903, p. lxii; see A.F.N. Poole, "The Boundaries of Canada" (1964), 42 Can. Bar Rev. 100, at pp. 124-5.

7. *Ibid.*, at p. 102.

construed as giving rise to the presumption that the land conveyed extended *ad medium filum*.⁸ In fact even the expression "along the bank," which is used in relation to the boundary along the Tidnish River, has been so construed, but the fact that there is an express reference to a specific bank, the northern upland bank, probably rebuts the presumption.

Finally, in 1927, the Privy Council defined the Quebec-Labrador boundary as running northward along the left or east bank of the Romaine River and its headwaters from the 52nd degree of north parallel to their source.⁹ For the reasons given in relation to the Tidnish River, the *ad medium filum* rule would not seem to apply here, and, therefore, the river lies wholly within Newfoundland. Quebec does not accept the ruling of the Privy Council but it is doubtful that it would be altered by judicial decision.¹⁰

TRANSBOUNDARY WATERS

Development in Absence of Legislative Intervention

Introduction

Perhaps the easiest way of discussing the legal problems relating to transboundary rivers is to pose a series of hypothetical situations in increasing order of complexity. Perhaps the simplest case is that of a person without statutory authority building a dam or other works on his land or polluting water in one province to the detriment of a landowner in another province down the stream, or the converse case of a landowner in a downstream province without statutory authority building a dam causing water to be penned back to the damage of a landowner in a province upstream. These problems raise two principal issues: (a) What is the applicable law? and (b) In what court may the injured party sue?

Applicable Law

Turning to the first question, there are no judicial decisions but it seems to be generally agreed that apart from statute the rights respecting the use of waters in interprovincial rivers are covered by the common law,¹¹ and this is the most likely possibility. Canadian courts have shown a marked tendency to apply to interprovincial situations traditional common law doctrines developed in other contexts.¹² The fact that the civil law governs in Quebec should make no difference in this connection because on these questions there is no, or at least no substantial,

8. See p. 242.

9. [1927] 2 D.L.R. 401; adopted by Term 2 of the Terms of Union of Newfoundland with Canada, confirmed by the British America Act, 1949, 12 & 13 Geo. VI, c. 22 (Imp.).

10. See Castel, *International Law Chiefly as Interpreted and Applied in Canada* (Toronto, 1965), p. 293.

11. John J. Connolly, Q.C., "The Problem of the South Saskatchewan River Development Project" in the *Report of the Royal Commission on the South Saskatchewan River Project* (Ottawa, 1952), p. 166; Laskin, "Jurisdictional Framework for Water Management" in *Resources For Tomorrow, Conference Background Papers* (Ottawa, 1962), vol. I, p. 211, at p. 221; Hanssen, "Constitutional Problems of Interprovincial Rivers" (1968), *Research Report No. 2, Agassiz Center for Water Studies*, Univ. of Man.; Gibson, "The Constitutional Context of Canadian Water Planning" (1969), 7 Alta. L.R. 71, at pp. 78-81.

12. For example, their treatment of the *situs* of property for constitutional purposes was developed from their treatment of the subject for purposes of determining the jurisdiction of ecclesiastical courts over property; see Gerard V. La Forest, *The Allocation of Taxing Power Under the Canadian Constitution* (Toronto, 1967), c. V.

difference between the two systems of law.¹³ Senator Carl Goldenberg reaches a similar conclusion by another route.¹⁴ He appears to believe Canadian courts might well adopt a doctrine of equitable apportionment like that developed by the Supreme Court of the United States in dealing with non-navigable rivers flowing across more than one state, and if they did so that they would be led to adopt the common law principles of riparian rights in dealing with interprovincial situations. The doctrine of equitable apportionment of the waters of such rivers developed in the American cases¹⁵ may be summarized. The upstream state may not dispose of water in such rivers as it may choose regardless of injury or prejudice to the downstream state. Each state has an interest in the water that must be respected and reconciled; each is entitled to an equitable apportionment of the waters. This does not necessarily imply an equal division or any other formula, but must be determined by the circumstances of the case. In applying the doctrine it is not unreasonable to enforce against a state its own local law, although such law must be looked upon as a guide and not as controlling in suits between states. Goldenberg concludes that if a doctrine such as that laid down in the United States is adopted in Canada, the legal rights of the provinces in the waters of interprovincial rivers are the common law riparian rights. Mr. K. C. MacKenzie also thinks it reasonable to assume that Canadian courts would apply the principles of equitable apportionment.¹⁶ Finally Per Gissvold has suggested that in interprovincial disputes the provinces might be subjected by the courts to statutory rules enacted by them to govern individuals.¹⁷

Appropriate Court

The question of the appropriate court in which an injured party may bring action arose in *Albert v. Fraser Companies, Ltd.*,¹⁸ in the Appellate Division of the Supreme Court of New Brunswick. There the defendant, a New Brunswick company resident in Edmundston, New Brunswick, in conducting log driving operations accumulated an excessive quantity of logs in the New Brunswick reaches of the Madawaska River causing the water to be penned back and to overflow the land of the plaintiff along the river in Quebec causing damage to his land and premises. The plaintiff brought action in New Brunswick, but the trial judge dismissed the case for want of jurisdiction. An appeal to the Appellate Division was dismissed by a majority, Baxter C.J. and Grimmer J., Harrison J. dissenting.

The view of the majority was that a court has no jurisdiction to entertain an action for damages for injury to land in a foreign country, and that for this purpose another province is a foreign country. The few cases on the point in

13. See, *inter alia*, *Miner v. Gilmour* (1858), 12 Moo. P.C. 131; 14 E.R. 861.

14. H. Carl Goldenberg, Q.C., "Legal Aspects of the South Saskatchewan River Development Project" in *Report of the Royal Commission on the South Saskatchewan River Project* (Ottawa, 1952), p. 168, at pp. 169 *et seq.*

15. See, especially, *Kansas v. Colorado* (1907), 206 U.S. 46; *New York v. New Jersey* (1921), 256 U.S. 296; *Wyoming v. Colorado* (1922), 259 U.S. 419; *Connecticut v. Massachusetts* (1931), 282 U.S. 660; *New Jersey v. New York* (1930), 283 U.S. 336; *Hinderlider v. La Plata and Cherry Creek Ditch Co.* (1938), 304 U.S. 92. The summary here given follows closely that of Senator Goldenberg, *ibid.*

16. K.C. Mackenzie, "Interprovincial Rivers in Canada: A Constitutional Challenge" (1961), 1 U.B.C. Law Rev. 499, at p. 505.

17. Per Gissvold, *A Survey of the Law of Water in Alberta, Saskatchewan and Manitoba* (Ottawa, 1959), p. 102.

18. (1936), 11 M.P.R. 209.

Canada generally support this view.¹⁹ There is, it is true, an early New Brunswick case to the contrary, but it is of little weight since the point was not raised.²⁰ Nonetheless there is much in reason to support the view of the dissenting judge, Harrison J. Previous judicial authority was not compelling, and the rule followed by the majority has in my view rightly been criticized as unnecessary and unjust.²¹ Ordinarily, a person can sue another in one province for a tort committed in a foreign country or another province if the act complained of is a tort where the action is brought and is not justifiable under the law where the act was committed. To this principle the courts have for long made exceptions where land in a foreign country is involved. It is understandable that a court will not want to adjudicate on the title or the right to possession of foreign land, and possibly to other actions that substantially raises the issue of title. But there seems no necessity for going as far as the majority in *Albert v. Fraser Companies, Ltd.* The inconvenience of this ruling is obvious from the facts of the case. Assuming an action for damages could be brought in Quebec, an injunction could not be obtained to restrain the defendant's activities in New Brunswick.

Further problems would arise if a development on an interprovincial river were undertaken by a provincial government, either directly or through a Crown agency, on its land which enured to the detriment of a landowner in another province. In the absence of statute, a provincial government, being technically the Crown, cannot be sued. If the appropriate court were in the province where the development took place, that province may be liable for suit if its Crown Proceedings Act or other statutes permitting suit against the province are sufficiently wide to permit such suit. But if the appropriate court is in the province where the damage took place, it seems doubtful that that province would permit suit against another province. In any event it could not do anything to enforce a judgment in the other province.

Senator Connolly has suggested a further difficulty where both parties to an interprovincial dispute are the provinces themselves.²² He doubts that one province could sue another because the Crown cannot sue itself. But, as Mr. Justice Laskin has noted,²³ the reality of the situation is that there are two

19. See *Brereton v. Canadian Pacific Ry.* (1898), 29 O.R. 57; *Re Doolittle v. Electric Maintenance and Construction Co.* (1901), 3 O.L.R. 460; *Boslund v. Abbotsford Lumber, Mining and Development Co.* (1925), 34 B.C.R. 485.

20. *Campbell v. McGregor* (1889), 29 N.B.R. 644; see also *Ahern v. Booth* (1903), 2 O.W.R. 696.

21. John Willis, "Jurisdiction of Courts—Action to Recover Damages for Injury to Foreign Land" (1937), 15 Can. Bar Rev. 112; H.S. Read, *Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth* (Cambridge, U.S.A., 1938), pp. 189-92; Walter S. Johnson, *Conflict of Laws* (Montreal, 1962), at pp. 937-8; Laskin, "Jurisdictional Framework for Water Management" in *Resources for Tomorrow, Conference Background Papers* (Ottawa, 1962), vol. I, p. 211, at p. 220; Dale Gibson, "The Constitutional Context of Canadian Water Planning" (1969), 7 Alta. Law Rev. 71, at p. 78, n. 40; Henry Landis, "Legal Controls of Pollution in the Great Lakes Basin" (1970), 48 Can. Bar Rev. 66, at p. 130.

22. Connolly, "The Problem of the South Saskatchewan River Development Project", in *Report of the Royal Commission on the South Saskatchewan River Project* (Ottawa, 1952), p. 159, at p. 166.

23. Laskin, "Jurisdictional Framework for Water Management" in *Resources For Tomorrow, Conference Background Papers* (Ottawa, 1962), vol. I, p. 211, at p. 223; the following agree: Per Gisvold, *A Survey of Water in Alberta, Saskatchewan and Manitoba* (Ottawa, 1956), at pp. 99-101; Hanssen, "Constitutional Problems of Interprovincial Rivers" (1968), *Research Report No. 2, Agassiz Center For Water Studies*, Univ. of Man.; Gibson, "The Constitutional Context of Canadian Water Planning" (1969), 7 Alta. L.R. 71 at p. 77; see also Mundell, "Legal Nature of Federal and Provincial Executive Governments" (1960), 2 Osgoode Hall Law Jo. 56, at pp. 70 *et seq.*

claimants: the provinces constitute separate administrative entities. The courts, in other contexts, have certainly not been deterred from grappling with the real issues notwithstanding the technicality of the indivisibility of the Crown.²⁴

Development Under Statutory Authorization

Applicable Law

Thus far the law has been discussed in terms of the situation between individuals at common law without statutory intervention. We must now turn to the question whether one province by statute may authorize the doing of anything within its territory that affects the flow or quality of water in another province. There have been some cases where provincial legislation has been held void as attempting to curtail rights outside the province,²⁵ and from these some writers argue that this applies to legislation of one province that would have the effect of depriving a person in another province of his riparian rights.²⁶ This, in their view, goes beyond the limits of provincial jurisdiction over property and civil rights and matters of a local or private nature in the province. If the view were accepted, it would mean that the provinces are subject to, and cannot legislate in violation of, the riparian rights doctrine on interprovincial rivers. Others, however, have expressed doubts that this view would be adopted by the courts.²⁷ There is much to be said for the view that the courts would make a distinction between situations affecting riparian rights in other provinces to a minor degree and those having substantial effects on such rights.²⁸ A number of writers argue that equitable apportionment principles like those developed in the United States might be accepted.²⁹ In either case, the result would be to pressure the provinces to make interprovincial agreements for the development of interprovincial rivers.³⁰

Appropriate Court

If a private individual or organization were authorized by a provincial statute to undertake in the province a development on an interprovincial river, a person whose riparian rights in another province were detrimentally affected would be in a similar position as he would be if there had been no statute authorizing the

24. *Re Silver Brothers*, [1932] A.C. 514, at p. 524; see also *Dominion of Canada v. Province of Ontario*, [1910] A.C. 637, at p. 645.

25. *Royal Bank of Canada v. The King*, [1913] A.C. 283; *Ottawa Valley Power Co. v. Attorney-General of Ontario*, [1936] 4 D.L.R. 594.

26. See John J. Connolly, Q.C., "The Problem of the South Saskatchewan River Development Project" in the *Report of the Royal Commission on the South Saskatchewan River Project* (Ottawa, 1952), p. 159, at p. 167; Leo McGrady, "Jurisdiction for Water Resources Development" (1967), 2 Man. Law Jo. 219, at pp. 241-2; Dale Gibson, "The Constitutional Context of Canadian Water Planning" (1969), 7 Alta. L.R. 71, at p. 80.

27. Bora Laskin, "Jurisdictional Framework for Water Management" in *Resources For Tomorrow, Conference Background Papers* (Ottawa, 1962), vol. I, p. 211, at p. 221; Henry Landis, "Legal Controls of Pollution in the Great Lakes Basin" (1970), 48 Can. Bar Rev. 66, at pp. 136-7.

28. See *In Re Oleska Ogal Estate*, [1940] 1 W.W.R. 665; Hanssen, "Constitutional Problems of Interprovincial Rivers" (1968), *Research Report No. 2, Agassiz Center For Water Studies*, Univ. of Man.; Gibson, "The Constitutional Context of Canadian Water Planning" (1969) 7 Alta. Law Rev. 71, at p. 80.

29. H. Carl Goldenberg, Q.C., "Legal Aspects of the South Saskatchewan River Development Project" in *Report of the Royal Commission on the South Saskatchewan River Project* (Ottawa, 1952), p. 168, at p. 174; Laskin, "Jurisdictional Framework for Water Management" in *Resources For Tomorrow, Conference Background Papers* (Ottawa, 1962), vol. I, p. 211, at pp. 221-2; K. C. Mackenzie, "Interprovincial Rivers in Canada: A Constitutional Challenge" (1961), 1 U.B.C. Law Rev. 499, at p. 505.

30. For a discussion of agreements involving Canada and the Prairie Provinces under the *Prairie Farm Rehabilitation Act*, R.S.C., 1952, c. 214, see Per Givold, *A Survey of the Law of Water in Alberta, Saskatchewan and Manitoba* (Ottawa, 1959), p. 103.

development. The major difference would seem to be that the constitutional validity of the statute would be raised in determining whether the development was justifiable in the province where it took place. The same problems of applicable law and appropriate court would be raised. Similar considerations as already discussed would also appear to apply where a provincial government itself undertakes a development on an interprovincial river. And here it is well to note that the Supreme Court of Canada has held against a statute to prevent the raising of the constitutional validity of a statute in the courts.³¹

But quite apart from its proprietary interests, a province has an interest in seeing that development of an interprovincial river in another province does not detrimentally affect water or its use within its territory. The writers who have dealt with the matter are all agreed that such questions cannot be judicially determined, in the absence of agreement between the provinces, because there is no constitutional provision for the judicial settlement of interprovincial disputes as there is in the United States.³² Of course, if it were considered desirable, the ordinary courts in the provinces could conceivably take jurisdiction on the ground that this affected the constitutionality of a statute.³³ But assuming this was possible, it seems extremely doubtful that the courts would take jurisdiction over a matter that seems more susceptible of convenient settlement by interprovincial agreement.

While, as mentioned, there is no constitutional provision for the judicial settlement of interprovincial disputes, section 19 of the Federal Court Act makes provision for the settlement of such disputes and federal-provincial disputes, on agreement by the affected parties.³⁴ The section reads:

19. Where the legislature of a province has passed an Act agreeing that the Court, whether referred to in that Act by its new name or by its former name, has jurisdiction in cases of controversies,

(a) between Canada and such province, or

(b) between such province and any other province or provinces that have passed a like Act,

the Court has jurisdiction to determine such controversies and the Trial Division shall deal with any such matter in the first instance.

By virtue of sections 27 and 39, this decision is appealable to the Federal Court of Appeal and the Supreme Court of Canada.

All the Atlantic Provinces have agreed to this jurisdiction,³⁵ and it seems probable that the federal Parliament could enact similar legislation that was compulsory.³⁶

31. *British Columbia Power Corporation v. British Columbia Electric Co. Ltd.*, [1958] S.C.R. 285.

32. John J. Connolly, Q.C., "The Problem of the South Saskatchewan River Development", and Goldenberg, "Legal Aspects of the South Saskatchewan River Development Project" in the *Report of the Royal Commission on the South Saskatchewan River Project* (Ottawa, 1952), p. 159, at p. 166, and p. 168, at p. 176, respectively; Laskin, "Jurisdictional Framework for Water Management" in *Resources For Tomorrow, Conference Background Papers* (Ottawa, 1962), Vol. I, p. 211, at pp. 222-3; Leo McGrady, "Jurisdiction for Water Resource Development" (1967), 2 Man. Law Jo. 219, at p. 243.

33. The attitude of the court in *British Columbia Power Corporation Ltd. v. British Columbia Electric Co. Ltd.*, [1958] S.C.R. 285 could be looked on as giving some support to this view.

34. R.S.C. 1970, c. 10 (and Supp.); formerly the Exchequer Court Act, R.S.C., 1952, c. 98, s. 30.

35. R.S.N.B., 1952, c. 83; R.S.P.E.I., 1951, c. 79, s. 40; R.S.N.S. 1909, c. 154; 1954, No. 13 (Nfld.).

36. See Hanssen, "Constitutional Problems of Interprovincial Rivers" (1968), *Research Report No. 2, Agassiz Center For Water Studies*, Univ. of Man.; Gibson, "The Constitutional Context of Canadian Water Planning" (1969), 7 Alta. L.R. 71, at pp. 88-9; see also below at p. 339.

But while the section provides a forum for the disposition of such controversies, it does not solve the problem previously discussed of what the applicable rule is.³⁷

Federal Jurisdiction

The extent of federal jurisdiction must now be examined.³⁸ The federal Parliament, of course, has in any case jurisdiction over the specific activities in water covered by navigation and shipping and fisheries. Again, too, the federal authorities could certainly undertake any water development on federal property even though this might have effects in several provinces. Moreover it could obtain jurisdiction by declaring various works to be for the general advantage, though it is doubtful, to say the least, that the rivers themselves could be considered to be works. In any event the extensive use of this power would result in political repercussions that the federal government would seek to avoid. There is also the jurisdiction over works and undertakings extending beyond a province, but here again this would hardly include the rivers themselves. Some activities on interprovincial rivers may fall within the trade and commerce power, for example, the exportation of power, which probably falls under section 92(10)(a) of the British North America Act in any case.

Finally, some writers have argued that interprovincial rivers fall under the "Peace, Order and Good Government" clause as going beyond the concern of any one province.³⁹ There is much to be said for this view, at least insofar as a development on an interprovincial river affects the rights of persons in other provinces. This argument is developed further in relation to international rivers in discussing the International River Improvements Act.⁴⁰ Assuming federal jurisdiction under this clause, however, is there any scope left for provincial legislation? May not, for example, two provinces validly agree to the development of an interprovincial river, subject to overriding legislation by the federal Parliament, even though the development has extra-provincial effect? One province, for example, might legislate to erect dams for hydro-power development, and the province downstream could alter the rights of riparian owners within its jurisdiction to permit the erection of the dam upstream. Such an approach would give the provinces maximum legislative capacity for developing their resources while preserving the general power of Parliament to make legislation, overriding provincial legislation if desired, whenever a development had effect in more than one province.

International Rivers

It may be well to note here that most of the problems relating to interprovincial rivers also apply to international rivers, but many of these do not arise because much of the law relating to international rivers is contained in the Boundary Waters Treaty and other Empire Treaties which the federal Parliament may implement under section 132 of the British North America Act.⁴¹

37. See *Province of Ontario v. Dominion of Canada* (1909), 42 S.C.R. 1, per Duff J. at pp. 118-9.
38. Federal jurisdiction is discussed in detail in Chapter One.

39. K. C. Mackenzie, "Interprovincial Rivers in Canada: A Constitutional Challenge" (1961), 1 U.B.C. Law Rev. 499, at p. 512; Hanssen, "Constitutional Problems of Interprovincial Rivers" (1968), *Research Report No. 2, Agassiz Center For Water Studies*, Univ. of Man.; Gibson, "The Constitutional Context of Canadian Water Planning" (1969), 7 Alta. L.R. 71, at p. 88.

40. See Chapter Seventeen.

41. See *ibid.*

PART V

International Rivers

CHAPTER SEVENTEEN

International Rivers

By Gerard V. La Forest

INTRODUCTION

In addition to the rivers, streams and lakes wholly situated within one of the provinces, and the interprovincial rivers, there are two international river systems coming within the Atlantic Provinces: the Saint John River system and the St. Croix River system.

The Saint John River basin is located in Northern Maine and the adjacent areas of Quebec and New Brunswick between the watersheds of the St. Lawrence River to the north and the Penobscot River to the south. The basin has a drainage area of 21,600 square miles, of which 65%, or 14,000 miles, lies in Canada and 35%, or 7,600 square miles, in the State of Maine. Of the total area in Canada, 2,750 square miles are in Quebec; the remaining 11,250 square miles are in New Brunswick. The main stem of the river is 450 miles in length.

The river rises in Little Saint John Lake on the international boundary between Quebec and Maine. It then flows along the boundary for 38 miles, then through Maine for about 107 miles, after which it forms the international boundary between Maine and New Brunswick for about 70 miles, after which it flows entirely in New Brunswick for the remaining 200 miles to its mouth at Saint John on the Bay of Fundy.¹

The St. Croix River basin is located in the southeastern part of Maine and the southwestern part of New Brunswick between the Saint John River basin in the north, the Penobscot River in the west and the coastal streams in the south and east, and has a maximum length of 70 miles and a maximum width of 50 miles. The basin has a drainage area of 1,635 square miles, of which 1,010 square miles are in Maine and 625 square miles are in New Brunswick.

The St. Croix River, the Chiputneticook Lakes, and Monument Brook, the headwater tributary of the St. Croix, form the international boundary from the point where Monument Brook begins at Amity, Maine, until the St. Croix reaches tidewater at Calais, Maine and St. Stephen, New Brunswick. The main branch originates in the Chiputneticook Lakes and flows in a predominantly southerly

1. This description is based on that by Gerald F. Fitzgerald, "Legal Aspects of the Power Development of the Saint John River Basin" (1959), 12 U.N.B. Law Jo. 7; for a more detailed description, see *Saint John River Basin-Quebec-Maine-New Brunswick-Interim Report of the International Joint Commission (Under the Reference of 7 July, 1952) by the International Saint John River Engineering Board* (April 6, 1953), pp. 18 *et seq.*

direction for some 77 miles to tidewater. It has 26 tributaries, the major ones being Monument Brook, the West Branch and Tomah stream. The basin contains several large lakes and small ponds.²

In common with other important rivers, the two rivers have been used for a variety of purposes: for water supply, power development, industrial processing, pulpwood log driving, fishing, recreation, and the disposal of sewage and industrial waste. This wide variety of uses engenders a host of legal problems, including the increasingly serious one of pollution. Legal problems may also arise where the use of a river has increased damage from flooding.

APPLICABLE LAW

International rivers are, of course, subject to the law of the provinces, states and countries where they flow. In the case of the St. Croix this includes the applicable law of New Brunswick and Maine and of the Parliament of Canada and the United States Government. The Saint John River is subject to all of these as well as the law of Quebec; moreover the Saint John River is an interprovincial as well as an international river, and this may raise additional complications. This study is limited to the law of the Atlantic Provinces, so the law of Quebec,³ Maine⁴ and the United States⁵ will not be examined here. It may perhaps be mentioned, however, that the underlying structure of the law in both Quebec and Maine—riparian rights, ownership of the bed and public rights of floating, navigation and fishing—is rather similar to that prevailing in the Atlantic Provinces subject to varying degrees of statutory intervention as is the case in these provinces. The relevant law of New Brunswick has already been examined. So has the law respecting interprovincial rivers, and reference should be made to this for constitutional and other jurisdictional problems common to these and international rivers. The bulk of the applicable law of the Parliament of Canada has also been examined, but the International River Improvements Act must obviously be studied in this context. This will be followed by an examination of relevant international law.

INTERNATIONAL RIVER IMPROVEMENTS ACT

In 1955 the federal Parliament enacted the International River Improvements Act to give it jurisdiction over dams, canals or other works altering the

2. For a more detailed description of the St. Croix River basin see *Water Resources of the St. Croix River Basin—Maine—New Brunswick—Report on Preliminary Investigations to the International Joint Commission (Under the Reference of 10 June, 1955) by the International St. Croix River Engineering Board* (September, 1957), pp. 9 *et seq.*

3. For a brief description of Quebec law as it bears on power development on the Saint John River, see Fitzgerald, "Legal Aspects of the Power Development of the Saint John River Basin" (1959), 12 U.N.B. Law Jo. 7, at pp. 13-4; see also such cases as *Attorney-General of Quebec v. Fraser* (1906), 37 S.C.R. 577, *MacLaren v. Attorney-General of Quebec*, [1914] A.C. 258, many of which are cited in this study as authority in respect of navigation and floatability, and ownership of the bed.

4. For a brief description of Maine Law as it bears on power development on the Saint John River, see Fitzgerald, *ibid.*, at p. 15; see also G. Graham Waite, "Public Rights in Maine Waters" (1965), 19 Maine Law Rev. 161; some Maine cases, notably *Davis v. Winslow* (1861), 51 Me. 264, have been frequently cited in Canada regarding floatability and navigation.

5. For a brief description of United States law as it bears on power development on the Saint John River, see Fitzgerald, *ibid.*, at p. 18. See also Trelease, "Federal Limitations on State Water Laws" (1961), 10 Buffalo Law Rev. 399; see also Waite, *ibid.*, at pp. 192-5.

natural flow and interfering with the actual or potential use outside Canada of water flowing from Canada to a point outside Canada.⁶

The Act raises some constitutional difficulties. Constitutional justification cannot be found under such obvious heads of federal power as navigation, defence or works connecting a province with another province or a foreign country. For it is not limited to navigation or defence purposes, but applies generally. And it does not apply solely to works connecting a province with a foreign country; as the Act reads it would often apply to works wholly situated in a province. The only constitutional justification advanced during the debate on the Bill in the House of Commons was that of the Honourable Jean Lesage that it fell within the power of Parliament to take legislative jurisdiction over any work by declaring it to be for the general advantage of Canada.⁷ The major difficulty with this justification is that the bulk of authority indicates that a specific statutory declaration must be made for a work to come under that provision⁸ and there is none in the Act. Until recently there was also some doubt whether Parliament could make a general declaration, particularly in regard to future works, but that doubt has now been removed.⁹ Justification may possibly be found, however, in the "Peace, Order and Good Government" clause. Under this clause, a number of matters, for example aeronautics,¹⁰ radio,¹¹ a national capital commission,¹² and offshore resources,¹³ have been held to fall within federal jurisdiction as affecting the body politic of the country. This approach would certainly seem to apply to international rivers, for the obstruction or diversion of such rivers can lead to most serious international contention involving the country as a whole, as occurred during the Columbia River controversy which prompted the adoption of the Act. The approach is reinforced by other doctrines tending to take out of provincial control any matters directly affecting the nation's sovereignty,¹⁴ such as peace and boundary treaties and the protection to be afforded diplomatic representatives.¹⁵ Finally there is a pattern both in the British North America Act itself,¹⁶ and in judicial decisions¹⁷ giving the federal Parliament legislative jurisdiction over matters involving works or activities having extra-provincial ambit.

The Act (section 4) prohibits the construction, operation or maintenance of an international river improvement without a licence issued under the Act. Compliance with this provision may be enforced by fine or imprisonment (section 5); in addition the Governor in Council may order any such improvement constructed, operated or maintained in violation of the Act to be forfeited, and anything so forfeited may be removed, destroyed or otherwise disposed of as the

6. 3 & 4 Eliz. II, c. 47 (Can.).

7. Debates of the House of Commons, 1955, at p. 1040.

8. See pp. 56-7.

9. See p. 57.

10. *Johannesson v. West St. Paul*, [1952] 1 S.C.R. 292.

11. *In re Regulation and Control of Radio Communication*, [1932] A.C. 304.

12. *Munro v. National Capital Commission*, [1966] S.C.R. 663.

13. *Re: Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792.

14. See *Francis v. The Queen*, [1956] S.C.R. 618, per Rand J.

15. See *Reference re Tax on Foreign Legations*, [1943] S.C.R. 208; see also La Forest, "May the Provinces Legislate in Violation of International Law?" (1961), 39 Can. Bar Rev. 78.

16. See ss. 91(13), (29), 92(10); the more important provincial legislative powers, for example, s. 92(13), (16), are expressed to be exercisable "in the province".

17. See, for example, *Citizens Insurance Co. v. Parsons* (1881), 7 A.C. 96.

Governor in Council directs at the cost of the owner (section 6). An "international river improvement" is defined as a dam, obstruction, canal or other work whose purpose or effect is (a) to increase, decrease or alter the natural flow of an international river, and (b) to interfere with, alter or affect the actual or potential use of the river outside Canada. The conditions, it should be observed, are cumulative. To be an international river improvement, a work must both affect the flow of an international river and its actual or potential use outside Canada. It should also be noted that the definition does not require that the international river improvement be located in an international river; it simply requires that the improvement have the purpose or effect just enumerated. This raises a number of questions. Would it include, for example, improvements in rivers, lakes, and streams flowing into rivers flowing across the boundary, assuming that such rivers, lakes and streams are not themselves international rivers? If so, why could it not also include obstructions to surface and ground waters? The latter construction, at least, seems doubtful. In the first place, the fact that the works defined are called "international river improvements" connotes that they are situated on a river, and this appears to be the approach taken in the regulations made under the Act.¹⁸ Moreover, such a construction might well go beyond the already somewhat tenuous constitutional base; it would be difficult, in most cases at least, to persuade a court that surface and ground waters so affect the body politic of Canada as to warrant its holding that the Act so construed falls within the "Peace, Order and Good Government" clause. The possibility that an improvement on a river, stream or lake flowing into a river that flows across the boundary is included in the term "international river improvement" is greater. In the first place, the purpose and effect of such a work is far easier to demonstrate. Again as will be seen later, it is probable that such upstream rivers, lakes, and streams are themselves part of an international river as defined.

A number of international river improvements are excepted from the application of the Act: (a) those constructed under a federal Act; (b) those situated in boundary waters as defined in the Boundary Waters Treaty; and (c) those constructed operated or maintained for domestic, sanitary or irrigation purposes, or other similar consumptive uses (section 7). Moreover, under section 3 (d) exceptions may be made by regulation, and under regulations so made the Minister of Energy, Mines and Resources¹⁹ may, on application being made and information supplied to him as required by the regulations, except from the operation of the Act any improvement, where, in his opinion (a) the improvement has, or will have in its operation an effect of less than one-tenth of a foot on the level or less than ten cubic feet per second on the flow of water at the Canadian boundary, or (b) the improvement is of a temporary nature.²⁰ In addition to these specific cases, the Minister may also, on receiving the required application and information, except from the operation of the Act any international river improvement

18. International River Improvements Regulations, SOR 56-9; P.C. 1955-1899 of Dec. 25, 1955; see s. 6(b).

19. Formerly the Minister of Northern Affairs and Natural Resources, but this was changed by the Government Organization Act, 1966 (1966-7), 14 & 15 Eliz. II, c. 25, s. 41. [Now the Minister of the Environment; see Addendum, p. 483].

20. International River Improvements Regulations, SOR 56-9; P.C. 1955-1899 of Dec. 25, 1955, s. 5(1).

that, in his opinion, should be excepted on account of special circumstances.²¹ The latter clause gives the Minister a virtual blanket excepting power, especially since the question of special circumstances is left entirely to his discretion. For a year after the commencement of the Act, it did not apply to existing river improvements, but this is no longer the case (section 9). Finally the Act applies to the Dominion and the provinces.

One of the most difficult problems in the interpretation of the Act is to determine with precision what is meant by an international river. Section 2(a) defines the term as "water flowing from a place in Canada to any place outside Canada." Though the definition speaks broadly of "water", it is extremely doubtful that it refers to waters generally such as surface waters, for the term defined is "international river", but it may well apply to brooks and streams. It could be interpreted as being limited to the actual river crossing the boundary, but it seems probable that it also includes lakes, and tributaries upstream, for this seems clearly within the obvious purpose of the Act. Moreover, if it had been intended to apply only to the actual river crossing the boundary, it is suggested that the word "river" rather than "water" flowing across the boundary would have been used. The term, therefore, probably includes the whole of an international river system.²²

A more difficult problem is whether a river wholly situated in Canada that flows into a boundary water, such as the St. Croix River or the international section of the Saint John River is an "international river". Dean Ryan finds this unlikely.²³ In his view it is more probable that on a tributary entering a boundary water it would become part of that boundary water in Canada, so that the river flowing into the boundary water would not be an international river within the Act. He concedes, however, that it might be held that water in a current flowing out of a tributary and crossing the boundary would be water flowing to a place outside Canada. Dr. Fitzgerald,²⁴ however, citing the Honourable Jean Lesage,²⁵ suggests that a tributary flowing into the international section of the Saint John River between New Brunswick and Maine would be an international river within the Act. He notes that only boundary waters are excluded because they fall within the jurisdiction of the International Joint Commission. The latter view seems preferable. The federal Parliament has the same interest in preventing interference with water flowing into boundary waters, as in waters flowing across the boundary, and a court could easily take judicial notice of the fact that almost inevitably some waters of a tributary flowing into a boundary water would flow across the boundary.

The Act (section 3) also authorizes the making of regulations respecting construction, operation, and maintenance of international river improvements, and for providing a system of permits. This allows for administrative surveillance of such improvements. It is unnecessary to deal in detail with the regulations but it

21. *Ibid.*, s. 5(2).

22. A similar opinion appears in Ryan, "Saint John River Power Development" (1958), 11 U.N.B. Law Jo. 20, at pp. 24-5 and in Fitzgerald, "Legal Aspects of the Power Development of the Saint John River Basin" (1959), 12 U.N.B. Law Jo. 7, at pp. 16-17.

23. *Ibid.*

24. Fitzgerald, "Legal Aspects of the Power Development of the Saint John River Basin" (1959), 12 U.N.B. Law Jo. 7, at pp. 16-17.

25. Canadian House of Commons, Standing Committee on External Affairs, 22nd Parl., 2nd Sess., 6 Minutes of Proceedings and Evidence, p. 192 (March 18, 1955); Mr. Lesage was then Minister of Northern Affairs and Natural Resources.

may be noted that they provide for the information to be supplied on applications for licences and exceptions, permit terms and conditions to be attached to licences, provide for suspension and forfeiture of licences for failing to comply with such terms and conditions, prohibit the assignment of licences without permission, and establish a maximum 50 year period for licences, subject to renewal for further 50 year periods.²⁶

Finally, international river improvements are made subject to provincial laws except in so far as such laws are repugnant to the Act or the regulations (section 10).

INTERNATIONAL LAW

Introduction

The state of international law regarding international rivers, in the absence of treaty, is impossible to define with precision. Certainly it will be affected by such considerations as the power of an upstream state to deprive the downstream state of water by prior appropriation and by the traditional doctrine of riparian rights of national legal systems. But perhaps nothing further can be stated with precision than that the law permits a state a free hand in developing the part of a river within its own territory, so long as this causes no substantial injury to other states.²⁷ Fortunately, it is not necessary for our purposes to enquire into the niceties of customary international law, for the bulk of problems on the Saint John and St. Croix River systems will be settled in the context of treaty obligations. It may be mentioned in passing, however, that there has been one diversion of the upper waters of the Saint John that would be governed largely by customary international law. This diversion is of the waters of Chamberlain Lake through the Telos Canal from their natural outlet, the Ailegash River (which flows into the Saint John) into the East Branch of the Penobscot River, diverting 270 square miles of drainage area. Though such a diversion would probably be unlawful under the present state of international law, it is not particularly important. Having regard to the great length of time that has now elapsed since the diversion began, acquiescence would probably be pleaded if an international claim was brought although the New Brunswick government did take some action in respect of it.²⁸

26. International River Improvements Regulations, SOR 56-9; P.C. 1955-1899, of Dec. 25, 1955.

27. See C. B. Bourne, "The Right to Utilize the Waters of International Rivers" (1965), 3 Can. Yearbook Int. Law 187, esp. at pp. 188, 264.

28. The diversion, I understand was first made in 1845, shortly after the Ashburton-Webster Treaty, for the purpose of floating logs. In 1903 the Lieutenant-Governor in Council (N.B. Orders in Council, March 11, 1903, p. 59) dealt with an Act of the Maine Legislature "An Act to Incorporate the East Branch Improvement Company" authorizing such a diversion, probably for electric power development. The minute states this action affected large interests on the Saint John, and that it implied the right of diverting any such waters, which could result in destroying the usefulness of the river as a public highway. This, in the Lieutenant-Governor in Council's view, violated the rights of New Brunswickers under the Ashburton-Webster Treaty. The Order in Council was transmitted to the Governor General. The diversion is also mentioned in N.B. Order in Council 24-194 of July, 1924, where it is stated that the canal diverted a drainage area of 270 square miles from the Saint John River, but it was thought best not to do anything about the matter at the time. It again came up in N.B. Order in Council 38-589 of November 16, 1938 when the view was again expressed that the diversion violated treaty rights, and that the legislation was *ultra vires* and that no prescriptive rights were acquired. The minute refers to a commission to study the matter in 1908 and its report of February, 1916. The Premier recommended to the Secretary of State for Canada that the International Joint Commission consider what steps should be taken to remedy the situation.

Treaty of Peace

The first treaty requiring mention is the Definitive Treaty of Peace of 1783 between Great Britain and the United States,²⁹ which by Article II defines a part of the international boundary as being formed "by a line to be drawn along the middle of the river St. Croix, from its mouth in the Bay of Fundy to its source. . ." However, it could not be agreed for many years what river was the St. Croix but following the award of Commissioners under the Jay Treaty of 1794,³⁰ the boundary was settled as it now exists.³¹ Such boundary provisions do not require legislative implementation and so this boundary forms part of the law of the land.³²

Ashburton-Webster Treaty

The next treaty of interest is the Ashburton-Webster Treaty.³³ It defines those parts of the Saint John River that form the international boundary. In such places it describes the line as running "up the middle of the main channel" of the river (Art. I). Article III provides that where the Saint John River forms the international boundary "the navigation of the said river shall be free and open to both parties, and shall in no way be obstructed." Then follows a provision that forest and agricultural produce grown in parts of Maine watered by the river or its tributaries are to have free access on the river to and from the seaport at its mouth, and to and round the falls of the river, and while in New Brunswick such produce is to be treated as if it were produce of the province; similar treatment is accorded the inhabitants of the upper Saint John for their produce where the river runs through Maine. But the provision does not give any right to either party to interfere with any regulations not inconsistent with the treaty which the governments of Maine and New Brunswick may make respecting navigation where both banks belong to the same party.

Several points must be made about this treaty. In common with other early treaties entered into by the Empire relating to Canada, it continues to apply to Canada notwithstanding its accession to international status.³⁴ Secondly, since it is an Empire treaty, any legislation required to implement it would fall within the legislative authority of the Dominion.³⁵ In fact the parts of the treaty dealing with navigation fall under federal authority notwithstanding that legislative authority is reserved for New Brunswick in the treaty.³⁶ But on matters not dealing with navigation, the Supreme Court of Canada has held that provincial law will apply until the treaty is implemented notwithstanding that it may violate treaty provisions.³⁷

29. *Treaties and Conventions concluded between the United States of America and Other Powers since July 4, 1776* (Washington, 1889), p. 375, at p. 377.

30. *Ibid.*, p. 379, at p. 382.

31. See G. V. La Forest, "Boundary Water Problems in the East" in Deener (ed.); *Canada-United States Treaty Relations* (Durham, N.C., 1963), p. 28, at pp. 29-30; for a detailed description see Moore's *International Arbitrations*, Vol. I, cc. 1-6.

32. See *Francis v. The Queen*, [1956] S.C.R. 618, per Rand J. The subject is discussed in more detail at pp. 64-7.

33. *Treaties and Conventions concluded between the United States and Other Powers since July 4, 1776* (Washington, 1889), p. 432, at pp. 434-5.

34. *Ex Parte O'Dell v. Griffin*, [1953] 3 D.L.R. 207.

35. This is discussed at pp. 64-6.

36. *Attorney-General of New Brunswick v. Canadian Pacific Ry.*, [1925] 2 D.L.R. 732 (P.C.).

37. *Arrow River & Tributaries Slide & Boom Co., v. Pigeon Timber Co.*, [1932] S.C.R. 495, per Lamont J.

Finally, the effect of the requirement that the boundary waters of the Saint John River are to be free and open merits examination. There has been a conflict of judicial opinion whether "free and open" permitted the imposition of tolls for the use of river improvements. The leading Canadian case is *Arrow River Slide and Boom Co. Ltd. v. Pigeon Timber Co.*³⁸ in the Supreme Court of Canada. There Anglin C. J. thought the same expression in Article II of the treaty (dealing with water communications and portages from Lake Superior to the Lake of the Woods) was simply meant to ensure to the citizens of both countries equality of rights to the water communications, and did not prevent the imposition of tolls so long as they did not discriminate against the citizens of the other country. Lamont J. (Cannon J. concurring) disagreed, however, thinking the treaty prohibited the imposition of tolls. Though the opinion of Lamont and Cannon JJ. appears to be supported by the earlier opinion of Mullock C.J. in *Rainy Lake River Boom Corp. v. Rainy River Lumber Co.*,³⁹ Anglin C.J.'s view seems preferable and has received greater support. Wright J. in the same case in the court below was of the same opinion,⁴⁰ and more important, his view was cited with approval by Henderson J. A. giving the unanimous judgment of the Ontario Court of Appeal in *Owen Sound Transportation Co. v. Tackaberry*.⁴¹ Moreover the Supreme Court of the United States has held that tolls are valid under the treaty if reasonable and non-discriminating.⁴² Finally, Canada and the United States have in connection with the St. Lawrence Seaway acted on that basis, despite the similar provision applying to passage on the St. Lawrence.⁴³

But if non-discriminatory tolls may be charged, the right of navigation or floatability cannot, it is suggested, be unilaterally removed even if it is non-discriminatory. However, this position was argued before the International Joint Commission by counsel for the United States in relation to the similar provision in Article VII relating to the St. Lawrence River. But as counsel for Canada stated, this amounts to equality of non-user, and though this may be consistent with the word "free" it hardly seems consistent with the word "open". The Commission did indicate, however, that the words "free and open" did permit reasonable interference with navigation.⁴⁴ There is no doubt, of course, that the two countries, acting together, could remove this right.

The cases have revealed other aspects of Article III. In *The Ship "D. C. Whitney" v. St. Clair Navigation Co.*⁴⁵ the Supreme Court of Canada held that an American vessel on its way from one United States port to another passing through the Canadian side of waters made "free and open" under Article II of the treaty was not subject to arrest on a warrant issued by a Canadian Admiralty Court in respect of a collision that occurred entirely in the United States. The court considered the situation analogous to innocent passage through the territorial sea.

38. *Ibid.*

39. (1912), 6 D.L.R. 401.

40. (1930), 65 O.L.R. 575.

41. [1936] 3 D.L.R. 272.

42. *Pigeon River Improvement Slide & Boom Co. v. Charles W. Cox* (1934), 291 U.S. 138, at p. 158.

43. See La Forest, "Boundary Water Problems in the East" in Deener (ed.), *Canada-United States Treaty Relations* (Durham, N.C., 1963), p. 28, at pp. 32,42.

44. See Chirokaikan Joseph Chacko, *The International Joint Commission between the United States and the Dominion of Canada* (New York, 1932), pp. 191 *et seq.*

45. (1906), 38 S.C.R. 303.

In *Smith v. Ontario and Minnesota Power Co.*,⁴⁶ the plaintiff sought to make use of the similar provision in Article II to make the defendant liable for damages alleged to have been caused by the defendant's dam, which he argued was built in contravention of the treaty. But the Supreme Court of Ontario held that the provision was intended for the benefit of persons desiring to pass along the river; it was not intended to take care of the rights of landowners and others near the route.

In *Owen Sound Transportation Co. v. Tackaberry*⁴⁷ the defendant attempted to resist the plaintiff's action for interference with his franchise for an exclusive ferry from two points in Ontario by arguing that the ferry proceeded over boundary waters, and by virtue of Article I of the Boundary Waters Treaty, such waters were to be free and open. But the Ontario Court of Appeal, citing Anglin C.J.'s remarks, found nothing interfering with the treaty in the grant of an exclusive ferry.

Finally in the *Arrow River* case,⁴⁸ three of the judges in the Supreme Court of Canada (Anglin C.J. and Smith and Rinfret JJ.) thought Article II was limited to water communications existing at the time of the treaty, but Lamont and Cannon JJ. disagreed. Assuming the first three judges were correct regarding Article II, it is doubtful that this applies to Article III regulating navigation and the transportation of lumber and agricultural produce on the Saint John River, because Article II expressly speaks of the communications "as now actually used", whereas by contrast there is no such expression in Article III.

Boundary Waters Treaty, 1909

Introduction

The next, and by far the most important, treaty affecting the Saint John and St. Croix Rivers is the Boundary Waters Treaty, 1909.⁴⁹ The treaty, in fact, applies to all fresh water forming the boundary and streams crossing the boundary. The treaty adopts a number of fundamental principles regulating the international waters of Canada and the United States, and establishes the International Joint Commission, a body possessing wide judicial and investigative powers.

The Boundary Waters Treaty was confirmed and implemented by Dominion statutes of 1911, 1914, 1952, 1963 and 1966.⁵⁰ The 1914 Act amended and modified all federal and provincial laws so as to conform with Canada's obligations under the treaty, and gave persons injured in the United States from any interference with or diversion from their natural channel of waters in Canada that in their natural channels would flow across the United States boundary or boundary waters (as defined in the treaty) the same legal remedies as if the injury took place in the part of Canada where the diversion or interference occurs. The Exchequer

46. (1919), 45 D.L.R. 266.

47. (1936) 3 D.L.R. 272.

48. *Arrow River & Tributaries Slide & Boom Co. v. Pigeon Timber Co.*, [1932] S.C.R. 495.

49. *Treaties and Agreements Affecting Canada, in Force between His Majesty and the United States of America* (Ottawa, 1927), p. 312.

50. (1911), 1 & 2 Geo. V, c. 28; (1914), 4 & 5 Geo. V, c. 5; (1952), 1 & 2 Eliz. II, c. 43; (1963), 12 Eliz. II, c. 41, s. 3; (1966-7), 14 & 15 Eliz. II, c. 25, s. 41 (Can.); now R.S.C., 1970, c. I-20. [The Exchequer Court has been continued in the Federal Court; see (1970-1), 19 & 20 Eliz. II, c. 1].

Court of Canada (now the Federal Court) is given jurisdiction over rights and obligations arising under the Act. The Commission is given power to hold sessions in Canada, to take evidence on oath and to compel the attendance of witnesses by application to superior court judges of the province where a session is held; such judges are empowered to make all necessary orders and issue appropriate processes. Provision is made for the payment of the Canadian members and employees of the Commission, and for paying the joint expenses of the Commission. The Act is administered by the Secretary of State for External Affairs.

In the United States, the treaty became the law of the land by virtue of the Constitution,⁵¹ but provision is made for the payment of necessary expenses by federal statutes.⁵² As in Canada provision is made empowering the Commission to administer, and take evidence on oaths; similarly there are provisions empowering courts to compel the attendance of witnesses and to make and issue all necessary orders and processes.

In a word the treaty not only constitutes international obligations between Canada and the United States; it is, up to a point at least, also the law of the land in both countries; by virtue of the Constitution and statute in the United States; by virtue of statute passed under section 132 of the British North America Act in Canada, for the Boundary Waters Treaty, being an Empire treaty, there is no question of Parliament's power to implement it, overriding any provincial statute if need be.⁵³ The manner in which the Dominion Act of 1914 and its successors have implemented the treaty, however, gives rise to difficult problems. They fail to provide regulation-making powers, penalties and administrative machinery for its enforcement. It may, therefore, be difficult at times to enforce some of the rights created by the treaty and confirmed by these statutes, and poses problems respecting the applicability of provincial legislation in the field. For example, there is no specific penalty to enforce the prohibition against pollution of boundary waters set forth in Article IV of the treaty. The better view would seem to be, however, that provincial statutes respecting pollution would apply in these waters, notwithstanding the confirmation of the Article by the 1904 statute.⁵⁴

Principles Respecting Boundary Waters

The first principle established by the treaty is that the navigation of all navigable boundary waters is forever to continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels and boats of both countries equally. "Boundary waters" are defined in the Preliminary Article as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary passes, including all bays, arms and inlets thereof, but not including (1) tributary waters which in their natural channels flow into such rivers, lakes and waterways, (2) waters

51. Article VI.

52. (1910), Public—No. 266; 36 Stat. 384; (1911), Public—No. 480; 36 Stat. 240; Public—No. 525; 36 Stat. 285.

53. This question is discussed at pp. 64-6.

54. For a discussion of these problems, see Henry Landis, "Legal Controls of Pollution in the Great Lakes Basin" (1970), 48 Can. Bar Rev. 66, at pp. 134-5.

flowing from such rivers, lakes and waterways, or (3) waters of rivers flowing across the boundary. Boundary waters, therefore, include the portions of the Saint John River constituting the international boundary and the waters of the St. Croix, the Chiputneticook Lakes and Monument Brook, and where these are navigable, they are open to navigation by the inhabitants and vessels of both countries on either side of the border.

Some of the waters of the Saint John and St. Croix River systems fall within the first exclusion. But the most important of these excepted waters are those flowing across the boundary to which further attention will be given later.

The principle of free navigation over boundary waters is made subject to any laws or regulations of either country, within its own territory, not inconsistent with the principle and applying equally and without discrimination to inhabitants and vessels of both countries. This qualification does not appear in the Ashburton-Webster Treaty, and this fortified the conclusion of the Ontario Court of Appeal in *Owen Sound Transportation Co. v. Tackaberry*⁵⁵ that a franchise to an exclusive ferry could be granted by Ontario. In that case, it will be remembered, Anglin C. J.'s remarks in the *Arrow River* case⁵⁶ upholding the right of either country to impose tolls for improvements to navigation notwithstanding the grant of free and open navigation in the Ashburton-Webster Treaty were cited with approval. It may well be, therefore, that the additional words in the Boundary Waters Treaty merely make explicit what was implicit in the Ashburton-Webster Treaty. If not, the application of the two provisions may require further examination in relation to the Saint John River. It could be argued that the Ashburton-Webster Treaty governs since it deals with particular waters, and the Boundary Waters Treaty is general. But this argument is weakened by the fact that the latter treaty refers to "all" boundary waters. If there is a conflict between the two, therefore, it is suggested that the Boundary Waters Treaty, being the later, should prevail, but the better view would seem to be that the Boundary Waters Treaty simply makes explicit what was implicit in the Ashburton-Webster Treaty.

Though of no direct relevance to the Saint John and St. Croix Rivers, it should be noted that Article I goes on to provide that so long as the treaty remains in force, the same right of navigation extends to all canals connecting boundary waters now existing or hereafter constructed, subject to the right of each country, without discrimination against the inhabitants or vessels of the other, to regulate such canals in its territory and to charge tolls for their use. The clause accentuates that the right of navigation in boundary waters is perpetual; it would not appear to be dependent on the continued existence of a treaty, though, of course, both countries could agree to terminate the privilege. The clause also supports the principle of charging tolls for artificially induced navigation, though it could equally well afford an argument that since it is mentioned here, such tolls cannot be charged in other contexts. As already noted, however, the predominant view is that reasonable tolls may be charged for use of improvements to navigation.

55. [1936] 3 D.L.R. 272.

56. *Arrow River & Tributaries Slide & Boom Co. v. Pigeon Timber Co.*, [1932] S.C.R. 495.

The treaty establishes a number of other principles relating to boundary waters. Thus Article VIII provides that each party on its own side has equal and similar rights to their use, but the following order of precedence is to be observed in such use: (1) uses for domestic and sanitary purposes; (2) uses for navigation, including the service of canals for the purposes of navigation; (3) uses for power and for irrigation purposes. However these provisions are not to apply to or disturb existing uses of boundary waters. Other principles relating to boundary waters are inextricably tied to the powers of the International Joint Commission to which attention will be given later. Before doing so, however, we must turn to the principles governing waters flowing across the boundary or into boundary waters.

Principles Respecting Transboundary Waters

i. General

In the absence of treaty a number of doctrines have been put forward as governing the relations between states in relation to waters flowing across the boundary.⁵⁷ The doctrine of riparian rights, under which the downstream state is entitled to the flow of water undiminished in quantity or quality, has sometimes been advanced. But as the International Joint Commission has indicated, different considerations apply between states;⁵⁸ this doctrine can prove unfair to the upstream country. Sometimes the doctrine of prior appropriation has been brought forward, but this doctrine has a tendency to favour the more developed countries. For a considerable period, the United States supported the Harmon Doctrine, named after the United States Attorney-General who first advanced the solution, that a state may do as it pleases with the waters in its own territory without regard to downstream interests. In recent years, the doctrine of "equitable apportionment" has been advanced which requires that the benefits from waters of transboundary rivers be equitably shared between the riparian states. All the doctrines are invariably brought forward whenever a dispute arises, but, in practice, there is a marked tendency for Canada and the United States, at least, to look for the most beneficial development of a river system, and divide the benefits in an equitable fashion following negotiations. However, in arriving at a solution the legal aspects are not ignored, and the governing doctrine must be examined with some care.

ii. Article II

Though William L. Griffin of the office of the Legal Adviser, Department of State of the United States, during the Columbia River controversy argued against the contention,⁵⁹ there seems little doubt, on the face of it, and this is the view of

57. See, *inter alia*, Charles E. Martin, "The Diversion of Columbia River Waters" (1957), *Proc. Amer. Soc. Int. Law* 2, at p. 3; Martin, "International Water Problems in the West" in David R. Deener (ed.), *Canada-United States Treaty Relations* (Durham, N.C., 1963), p. 51, at pp. 54-6.

58. I.J.C. Dockets 10 and 11, *St. Croix Water Power Company and Sprague Falls Manufacturing Co. Ltd. References* (1915).

59. Griffin, "Legal Aspects of the Use of Systems of International Waters" (1958), U.S. Sen. Doc. No. 118, 85th Cong., 2d Sess.; Griffin, "The Use of Waters of International Drainage Basins Under Customary International Law" (1959), 53 *Amer. Jo. Int. Law* 50.

the bulk of Canadian⁶⁰ and American⁶¹ writers, that Article II of the Boundary Waters Treaty adopts the Harmon Doctrine, with modifications, in relation to waters crossing the boundary and waters flowing into boundary waters (both of which are for convenience referred to herein as transboundary waters). The Article reads as follows:

Each of the High Contracting Parties reserves to itself or to the several State Governments on the one side and the Dominion or Provincial Governments on the other as the case may be, subject to any treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters; but it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs; but this provision shall not apply to cases already existing or to cases expressly covered by special agreement between the parties hereto.

It is understood, however, that neither of the High Contracting Parties intends by the foregoing provision to surrender any right, which it may have, to object to any interference with or diversions of waters on the other side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary.

The importance of the Article in relation to the Saint John and St. Croix River systems is readily apparent.⁶² The Saint John River is a transboundary river flowing from Maine to New Brunswick, with Maine deriving upstream advantages. It is true that Maine is also the downstream state in relation to Quebec, but the river in Quebec is relatively unimportant. Further all the tributaries flowing into the St. Croix and Chiputneticook Lakes are covered by the Article, as are also those tributaries flowing into the Saint John where it is a boundary water, and here again the larger quantity of water flowing into the St. Croix from American tributaries should be noted. Maine is, therefore, in a favourable legal position under the treaty. It could, for example, divert the flow of the Saint John River, build dams so as to detrimentally affect its flow downstream, and so on. However, the

60. Ladner, "Diversion of Columbia River" (1956), Proc. Pacific Northwest Regional Meeting Amer. Soc. Int. Law 1; Goldie, "Recent Developments on the Columbia River Diversion" (1958), Proc. Pacific Northwest Regional Meeting, Amer. Soc. Int. Law 3; Maxwell Cohen, "Some Legal and Policy Aspects of the Columbia River Dispute" (1958), 36 Can. Bar Rev. 25; Austin, "Canadian-United States Practice and Theory Respecting the International Law of International Rivers: A Study of the History and Influence of the Harmon Doctrine" (1959), 37 Can. Bar Rev. 393; C. B. Bourne, "The Columbia River Controversy" (1959), 37 Can. Bar Rev. 444; see also William F. Ryan, "Saint John River Power Development: Some International Law Problems" (1958), 11 U.N.B. Law Jo. 20; Gerald F. Fitzgerald "Legal Aspects of the Power Development of the Saint John River Basin" (1959), 12 U.N.B. Law Jo. 7.

61. Len Jordan, comments in *Report of the Joint Hearings Before the Senate Committee on Interior and Insular Affairs and a Special Subcommittee of Senate Committee on Foreign Relations Upper Columbia River Development* (1956), 84th Cong., 2d Sess.; Martin, "The Diversion of Columbia River Waters" (1957), Proc. Amer. Soc. Int. Law 2; McKay, "Recent Developments in the Columbia River Controversy" (1958), Proc. Pacific Northwest Regional Meeting, Amer. Soc. Int. Law 3; (1958), 49 Pacific Northwest Quarterly 104; Robert D. Scott, "The Canadian American Boundary Waters Treaty: Why Article II?" (1958), 36 Can. Bar Rev. 511; Martin, "International Water Problems in the West" in Deener, *Canada-United States Treaty Relations* (Durham, N.C., 1963), p. 51.

62. For discussions of this and other problems respecting the Saint John River, see Ryan, "Saint John River Power Development: Some International Law Problems" (1958), 11 U.N.B. Law Jo. 20; Fitzgerald, "Legal Aspects of the Power Development of the Saint John River Basin" (1959), 12 U.N.B. Law Jo. 7.

bargaining position in relation to one river is affected by that in relation to other rivers, such as the Yukon which flows into Alaska. Moreover, past experience, especially that in relation to the Columbia River, will give considerable guidance in any conflict in relation to the Saint John and St. Croix. That experience also shows a desire on the part of both countries in recent years to try to achieve the maximum development of a river while apportioning the benefits equitably.

There are, however, qualifications to the Harmon Doctrine as adopted in the Boundary Waters Treaty. In the first place, the right is made subject, by Article II itself, to pre-existing treaties. Thus none of the affected governments, the United States, the Dominion, Maine or New Brunswick, is permitted to interfere with the right of navigation and floating on the Saint John accorded by the Ashburton-Webster Treaty. Secondly the Article retains to each country the right to object to any interference with, or diversions on, the other side that would be productive of material injury to the navigation interests on its side. This, of course, may not really advance the legal position at all unless, as is possible, a tribunal reads into this an exception to the Harmon Doctrine in favour of navigation. Thirdly, the exclusive jurisdiction given to each party over transboundary waters on its own side is limited by the provision in Article IV providing that boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.

Finally, Article II makes a further modification to the Harmon Doctrine that was subjected to close scrutiny during the Columbia River controversy. It provides that any interference with or diversion from their natural channel of waters flowing across the boundary or into boundary waters on either side of the boundary shall give rise to the same rights and entitle the injured party to the same legal remedies as if such injury took place in the country where such diversion or interference occurs. This, it will be remembered, was implemented by section 3 of the Dominion Act of 1911, which by section 4 gave jurisdiction to the Exchequer Court (now the Federal Court) of Canada. In the United States no legislation specifically implementing Article II appears to have been enacted. It may, of course, be that the Article is self-executing and so becomes the law of the land by virtue of the United States Constitution, but an appropriate court must be found.⁶³ It has been suggested that a Canadian "injured party" might invoke a provision of the United States Code vesting in the Federal District Courts jurisdiction over civil actions brought by aliens for torts in violation of the law of nations or treaty.⁶⁴ Whether the clause is self-implementing or not, the United States, like Canada, is under an obligation to implement it.

The remedy available under the clause has been the subject of considerable disagreement. Professor Bourne has brought forth an argument that would give it little or no effect.⁶⁵ He argues, citing weighty contemporary opinion, that all the

63. Griffin, "Problems Respecting the Availability of Remedies in Cases Relating to the Uses of International Rivers" (1957), *Proc. Amer. Soc. Int. Law* 36, at pp. 38-9.

64. David R. Deener, comments on Griffin, *ibid.*, at pp. 41-2.

65. C. B. Bourne, (1956), *Proc. Pacific Northwest Regional Meeting, Amer. Soc. Int. Law*, 26; Bourne, "Columbia River Diversion: The Law Determining Rights of Injured Parties" (1958), 2 *U.B.C. Leg. Notes* 610; Bourne, "The Columbia River Controversy" (1959), 37 *Can. Bar Rev.* 444; see also Austin, "Canadian-United States Practice and Theory Respecting the International Law of International Rivers: A Study of the History and Influence of the Harmon Doctrine" (1959), 37 *Can. Bar Rev.* 393.

clause does, when the injury occurs in the United States from a diversion in Canada, is to give an injured party in the United States the same rights and remedies as a Canadian would have if the injury had occurred in Canada. The reverse would, of course, be the case if the diversion in the Maine portion of the Saint John or in a tributary of the Saint John or St. Croix caused an injury to a Canadian in Canada. Professor Bourne goes on to say that since the Water Act of British Columbia provides that only licensees under that Act have a right to the flow of water in streams, a downstream American claimant would have no right since British Columbia could not grant a licence outside the province, though Professor Bourne does concede that it is possible, though unlikely, that a British Columbia court might give "licensee" status to a downstream American who held a valid appropriative right. If Professor Bourne's argument prevailed, it may be, as Dr. Fitzgerald⁶⁶ has noted, that an injury in New Brunswick owing to a diversion of the Saint John River in Maine (and for that matter a diversion in Maine of tributary waters flowing into boundary waters of the Saint John or St. Croix) might give a New Brunswick injured party no remedy; for a licence from the United States Federal Power Commission is necessary in relation to certain uses of water, notably for power, on an international river, and such a use could not be given in relation to waters in New Brunswick.

Since the clause would thus be reduced to a virtual nullity, a number of commentators⁶⁷ rejected this view during the Columbia River controversy. Perhaps the strongest argument against it is that of R.D. Scott who suggested that the effect of the clause was not to give a substantive right in British Columbia but a right to bring an action there; the substantive right arose in the place where the injury occurred.⁶⁸

Assuming that the clause does give an effective remedy, to whom does it apply? During the Columbia River controversy, the Chairman of the United States section of the International Joint Commission argued that the remedy only applied to individuals.⁶⁹ He noted that "parties" in the clause had the "p" in lower case, whereas reference to sovereign states in the earlier part of the clause was the "High Contracting Parties" with a capital "P". Accordingly, he felt, the United States Government was not limited to that remedy, but could avail itself of others. This brings in arguments based on riparian rights, prior appropriation, equitable apportionment and other possible doctrines under customary international law. But, as Bourne has pointed out, Article II defines the law between the parties; if Article II does not give the United States a remedy, it has none.⁷⁰ And, in any event, Professor

66. Fitzgerald, "Legal Aspects of the Power Development of the Saint John River Basin" (1959), 12 U.N.B. Law Jo. 7, at pp. 30-1, esp. n. 107.

67. Martin, "The Diversion of Columbia River Waters" (1957), Proc. Amer. Soc. Int. Law 2, at p. 6; Robert D. Scott, "The Canadian-American Boundary Waters Treaty: Why Article II?" (1958), 36 Can. Bar Rev. 511; Cohen, "Some Legal and Policy Aspects of the Columbia River Dispute" (1958), 36 Can. Bar Rev. 25.

68. *Ibid.*

69. Len Jordan in Proc. of the International Joint Commission, 1955; see Scott, *ibid.*, pp. 512-3; Austin, "Canadian-United States Practice and Theory Respecting the International Law of International Rivers: A Study of the History and Interpretation of the Harmon Doctrine" (1959), 37 Can. Bar Rev. 393, at pp. 441-2.

70. Bourne, "Diversion of the Columbia River in Canada", Publications of the University of B.C. Lecture Series No. 27, p. 17, at p. 24; see also Austin, *ibid.*, at pp. 441-2.

Cohen has noted that the contracting parties are referred to with a lower case "p" in the sentence following the clause under discussion.⁷¹

The settlement of the Columbia River controversy has set these problems to rest so far as that river is concerned, but if a serious controversy arose on the Saint John, and possibly the St. Croix, these arguments might again be pressed into service, with the two parties altering sides. Without going into all the niceties of the subject, the better view would seem to be as follows: (1) the Harmon Doctrine was adopted as exclusively governing the transboundary waters of Canada and the United States, except in so far as amended by the treaty itself and other agreements between the two countries; (2) the clause purporting to give a remedy for diversions on the other side of the border imposes a duty on each country to provide a legal remedy for injuries suffered by downstream riparian owners of the other country; (3) this clause applies to Canada and the United States and their provinces and states, respectively, as well as to individuals.

iii. Downstream Benefits

Another matter closely related to the exclusive jurisdiction and control of the upstream state over transboundary waters is downstream benefits resulting from upstream storage. Upstream storage may give rise to benefits downstream in at least two ways. First, by regulating the flow of water a greater amount of continuous hydro-electric power may be produced downstream. This is particularly important on the Saint John River because the most appropriate site for upstream storage for the development of hydro-electric power in New Brunswick on that river is at the Dickey site in Maine. Secondly, upstream storage may provide flood control benefits to the downstream area. This was of major importance in relation to the Columbia, but is not nearly as important to the Saint John and St. Croix River systems.

The question of downstream benefits came before the International Joint Commission in 1925 when its approval was sought to build a power development on the Saint John River at Grand Falls, New Brunswick, about three miles below the point where the river ceases to be the international boundary.⁷² The development required the building of a dam at Grand Falls which backed up the water for 32 miles, 29 of which were on the international boundary section of the river. The United States argued that the flow of water along the river where it formed the international boundary constituted potential power to which both governments had equal rights, and claimed a half share of the amount of power corresponding to the flow along the 29 miles of international boundary multiplied by the 16 foot fall along this section. Canada denied the claim, but the Commission did not have to adjudicate upon it because the applicant agreed to furnish 2,000 H.P. for use in Maine at a price which was in effect not to be greater than that charged to like consumers in New Brunswick.

71. Cohen, "Some Legal and Policy Aspects of the Columbia River Dispute" (1958), 36 Can. Bar Rev. 25, at p. 30.

72. I.J.C. Docket No. 19. For a discussion, see Bloomfield and Fitzgerald, *Boundary Waters Problems of Canada and the United States (The International Joint Commission 1912-1958)* (Toronto, 1958), pp. 113-5; Fitzgerald, "Legal Aspects of the Power Development of the Saint John River Basin" (1959), 12 U.N.B. Law Jo. 7, at pp. 22-3, 34-6.

But settlement of the next case, the Libby Dam, was by no means as easy.⁷³ The dam there was to be built in the central portion of the Kootenay River where it briefly flows into the United States. The dam would have raised the water level at the border some 150 feet and would have created a large reservoir going back 42 miles in Canada and detrimentally affecting communication between a few Canadian communities. The United States had agreed to pay damages resulting to Canadian residents, that is the costs of clearing the lands to be flooded, compensation for the land and the cost of relocating transportation facilities and resettling displaced persons, but it offered nothing as recompense for the benefit accruing downstream from the use for storage of the Canadian section of the river. The United States and Canadian sections of the International Joint Commission were sharply divided: the United States section refused altogether to recognize compensation for downstream benefits; the Canadian section insisted that Canada should share in the power. The argument in favour of the compensation here was stronger than in relation to the Grand Falls dam, because the Kootenay was a transboundary river where the upstream country owned both sides of the river, whereas the Saint John at the relevant point was only a boundary river, and so it could be argued that in the Libby Dam case Canada should receive a share of the whole increase in level instead of only half as the United States claimed in the Grand Falls case.

It is not necessary to review in detail the further developments of the Columbia River controversy.⁷⁴ Suffice it to say that gradually the United States softened its attitude about downstream benefits, and that the principles upon which the two countries settled the question of upstream storage in the Columbia River Treaty and Protocol⁷⁵ will provide the major source of guidance when the point arises in relation to the Saint John and St. Croix Rivers. Before the treaty was negotiated, the United States and Canada had requested the International Joint Commission to devise principles for the sharing of benefits resulting from the cooperative development of the Columbia River, more particularly in regard to power development and flood control. The Commission had reported on the matter on January 28 and 29, 1959.⁷⁶ It is not practical to discuss all these principles in detail but the major ones should be noted. The most important is that downstream power and flood control benefits in the United States should be divided equally between the two countries. It also recommended other principles, notably that each country should bear the cost of its own installations. These principles were carried into the treaty. By Article V, Canada is to receive one half the downstream power benefits, defined by Article VII as "the difference in the hydro-electric power capable of being generated in the United States with and without the use of Canadian storage determined

73. I.J.C. Dockets Nos. 65 and 69; see also Bloomfield and Fitzgerald, *ibid.*, pp. 190-51 Bourne, "The Columbia River Controversy" (1959), 37 Can. Bar Rev. 444, at pp. 446-50; Ralph W. Johnson, "The Canada-United States Controversy over the Columbia River" (1966), 41 Wash. L.R. 676, at pp. 713-5.

74. For an excellent review, see Johnson, *ibid.*

75. The treaty and protocol are reproduced in *The Columbia River Treaty, Protocol and Related Documents* (Ottawa, 1964); see also *The Columbia River Treaty and Protocol* (Ottawa, 1964). Both books were issued by the Departments of External Affairs, and Northern Affairs and Natural Resources.

76. I.J.C. Report of December 29, 1959, reproduced in *The Columbia River Treaty, Protocol and Related Documents* (Ottawa, 1964), pp. 39 *et seq.*; for a discussion see Johnson, "The Canada-United States Controversy over the Columbia River" (1966), 41 Wash. L.R. 676, at pp. 736-9; see also Martin, "International Water Problems in the West" in Deener (ed.), *Canada-United States Treaty Relations* (Durham, N.C., 1963), at pp. 62-3.

in advance." Power benefits may, of course, be shared *in specie*, but flood control benefits require recompense in money or other means. This was done on the basis of the estimated annual flood damage prevented by upstream storage. The subsequent protocol also provided for the sale in the United States of Canada's entitlement to power for the first 30 years of development.

While the principles developed in relation to one river cannot be applied without modification to other rivers, the experience on the Columbia River suggests that downstream benefits on the Saint John River resulting from upstream storage in Maine would entitle Maine to expect compensation. This compensation, in relation to increased power produced in New Brunswick, would be equal to half such increased power (or if Maine, New Brunswick and the federal governments agreed, a money compensation based on the value of such power). For flood control benefits, the estimated value of loss avoided by flood would appear to be the appropriate compensation. On the Columbia River, it was agreed that each country should pay the costs of installations in their respective territory. This was, perhaps, the only practicable way to arrive at the equitable apportionment the International Joint Commission had recommended as the general approach. This solution might not, however, achieve an equitable division of costs on another river and another principle might be called for.

The foregoing discussion assumes storage entirely in Maine and power generation entirely in New Brunswick. A similar division of downstream power and flood control benefits downstream would seem appropriate where both storage and generation are carried out wholly on boundary waters. But appropriate modifications might be required in cases where use of one country's resources are differently balanced as in the case of the Grand Falls dam where the dam was wholly in Canada and the flow of the river in question was along the international boundary.

iv. The International Joint Commission

In addition to defining a number of principles governing international waterways, the Boundary Waters Treaty also established the International Joint Commission.⁷⁷ The Commission is composed of six commissioners, three from Canada and three from the United States (Article VII); each national section has its own chairman and secretary (Art. XII). It has power to make rules governing its procedure, and may administer, and take evidence on oath (Article XII). The rules adopted by the Commission resemble rules followed by courts of law.⁷⁸ A majority has power to render a decision, but if the Commission is equally divided or otherwise unable to render a decision, each section reports to its own government (Articles IX, XII). But when the Commission gives a decision in the exercise of its judicial powers, it is binding on, and can only be altered by agreement of both countries.

77. Article VII. For discussions of the Commission, see Robert A. MacKay, "The International Joint Commission between the United States and Canada" (1928), 22 *Amer. Jo. Int. Law* 292; Chirokaikan Joseph Chacko, *The International Joint Commission between the United States and Dominion of Canada* (New York, 1932); Bloomfield and Fitzgerald, *Boundary Waters Problems of Canada and the United States (The International Joint Commission 1912-1958)*, (Toronto, 1958).

78. See *International Joint Commission, United States and Canada, Rules of Procedure and Text of Treaty* (Ottawa, Washington, 1965).

The Commission has interpreted its powers in a very flexible manner. Where its approval is required for certain works under the treaty, it sometimes makes its approval subject to certain conditions and retains jurisdiction pending their fulfillment. Again it often appoints boards to study technical questions or to supervise works it has approved so as to ensure that conditions it has laid down are followed. In the latter case it sometimes provides for appeals from such boards to the Commission.⁷⁹

We must now examine in more detail the powers of the Commission that are relevant to the Saint John and St. Croix Rivers. Article III deals with boundary waters and so applies to the whole of the St. Croix, the Chiputneticook Lakes, Monument Brook and the part of the Saint John forming the international boundary. Under this Article, the parties agreed that, in the absence of special agreement between them, no uses, obstructions or diversions of boundary waters affecting the natural level or flow of boundary waters on the other side of the line should thenceforth be made except with the authority of the United States or the Dominion within their respective jurisdiction and with the approval of the Commission. In a word, each country has in relation to these uses on its side of the line limited its power, and that of its citizens, to act except with the approval of the Commission.

Some exceptions are made to this, however. The Article does not limit the right of either government on its own side of the line to undertake or carry on governmental works for the benefit of commerce and navigation that do not materially affect the level or flow of boundary works on the other side. Since the instances of "commerce and navigation" mentioned in the Article are all related to navigation—deepening channels, breakwaters, harbour improvements—it would seem that commerce is there used in a restricted sense. Another exception to the Article is that it is not intended to interfere with the ordinary use of such waters for domestic and sanitary purposes. In reading this clause, however, it must be remembered that Article IV absolutely prohibits the pollution of boundary waters, as well as transboundary waters, on one side of the line to the injury of health or property on the other. This Article, however, does not come within the judicial powers of the Commission. Complaints regarding such pollution must be made to the government of the injured party which in turn may seek redress from the other government through diplomatic channels. The Commission may study the matter and make suggestions, but it has no authority to compel action.

Article IV provides that in the absence of special agreement between the parties to the treaty, neither will permit the construction or maintenance on its side of the boundary of remedial or protective works, dams or other obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary unless such construction or maintenance is approved by the Commission. This Article is obviously applicable to the Saint John River in New Brunswick.

79. See Bloomfield and Fitzgerald, *Boundary Waters Problems of Canada and the United States (The International Joint Commission (1912-1958))* (Toronto, 1958), pp. 28-9, 32-7.

Article VIII sets forth a number of rules or principles governing the Commission in adjudicating on matters falling under Articles III and IV. These provide for equal and similar rights of the parties in the use of boundary waters and for following the priority of uses already spelled out. But these provisions are not to affect pre-existing uses. The Article, moreover, gives the Commission important discretionary powers. It empowers the Commission to suspend the equal division of rights of the parties to boundary waters in cases of temporary diversion along such waters where such equal division cannot be made advantageously because of local conditions and where such diversion does not diminish elsewhere the amount of water available for use on the other side.

The meaning of "temporary diversion" was canvassed in the St. Croix Water Power and Sprague's Falls Manufacturing Company Limited applications before the Commission in connection with a diversion of the St. Croix River.⁸⁰ It was argued on the one hand that "temporary" referred to the period of time the diversion is to continue; in short, that the commission had authority to permit a diversion only for a limited period of time. On the other hand it was contended that "temporary" referred to the character of the diversion, and so long as the waters were returned almost immediately to the regular channel the diversion was temporary no matter for how long a time it continued. The same result was sought to be achieved by another argument: that temporary referred to the time that any particular portion of the waters was diverted before its return to the channel. The Commission found it unnecessary to express an opinion on the point. While it did note that the primary meaning of "temporary" has reference to time, still the second of the above meanings is a quite natural meaning of the word, and the Commission wisely left the question open. It may be useful for the development of a river for the Commission to be left with a discretion to choose which of these meanings to apply.

Article VIII gives the Commission a further discretionary power. Where the elevation of the natural level of waters on one side of the boundary results from the construction or maintenance on the other side of remedial or protective works, dams or other obstructions in boundary waters, or in waters flowing therefrom, or in waters below the boundary in rivers flowing across the boundary, the Commission must require, as a condition of approval, that adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side.

In exercising the powers under Articles III, IV and VIII, the Commission's decisions are final, subject only to the agreement of both parties. These powers may, therefore, be described as judicial. In addition, Article IX gives the Commission broad powers of investigation at the request of either government. It provides that either government may refer to the Commission any matters of difference arising along the common frontier involving rights, obligations or interests of either country in relation to the other or its inhabitants, and the Commission is authorized to examine and report thereon. Unlike decisions under the previous Articles, however, the Commission's reports under the Article IX are mere

80. I.J.C. Dockets Nos. 10 & 11; see the *Opinion of the Commission* at pp. 10-11.

recommendations. In practice all references under the Article have been joint references by both countries. Finally Article X provides that any other matter of difference arising along the frontier may jointly be referred to arbitration before the Commission, but the procedure has never been used.

*v. I. J. C. Applications and References on the Saint John and St. Croix—
Article III*

The Commission has had several matters referred to it respecting the Saint John and St. Croix Rivers.

References Under Article III

Under Article III it has had one application respecting the Saint John and eight respecting the St. Croix.

The Saint John River application involved a farmer, Jean Lariviere, who in 1933 built a small dam on the river between Quebec and Maine to provide power for a shingle and grist mill in ignorance of the requirements of the treaty.⁸¹ On learning of these requirements in 1935 he applied for, and received approval under Article III, the Commission dispensing with the usual procedure, such as advertising and public hearings. But the approval was made subject to the mandatory requirement of Article VIII that the applicant would indemnify riparian owners for damages caused by flooding resulting from the construction of the dam.

The first two applications under Article III respecting the St. Croix River also involved works constructed in ignorance of the requirements of the treaty. There the St. Croix Water Power Co. and the Sprague's Fall Manufacturing Co., the first a Maine company, the other a Dominion company, had constructed at Grand Falls, Maine, a dam across the river and a power canal on the United States side to carry the waters of the river to a power house a short distance away.⁸² Since the St. Croix is a boundary water, and the dam and diversion affected its level on both sides of the line, approval of the works was required under Article III, and on hearing of this the companies applied for, and obtained the approval of the Commission. However, the order of approval was made subject to conditions (1) requiring the applicant to obtain proper authority for the maintenance of the works from the United States and Dominion governments; (2) prescribing that the waters diverted should be used only for the purposes of supplying power for the St. Croix Paper Company's pulp and paper mill at Woodland, Maine, unless the Commission, on application by the United States or the Dominion, continues the order, subject to such conditions as it may prescribe; (3) specifying maximum permissible water levels; (4) creating a board, later called the International St. Croix River Board of Control, consisting of a member appointed by the Dominion and one by the United States, to supervise and regulate the operation of the works and to ensure compliance with the conditions in the order of approval.

81. I.J.C. Docket No. 33; see Bloomfield and Fitzgerald, *Boundary Waters Problems of Canada and the United States (The International Joint Commission 1912-1958)* (Toronto, 1958), p. 146
Fitzgerald, "Legal Aspects of the Power Development of the Saint John River Basin" (1959),
12 U.N.B. Law Jo. 7, at p. 22.

82. I.J.C. Dockets Nos. 10 & 11; see Bloomfield and Fitzgerald, *ibid.*, pp. 94-5.

The purpose of the fourth condition was to ensure that lower riparian owners should not be subjected to losses owing to arbitrary interruptions in the flow of water.

Several points were raised during the hearing of these applications that merit attention. One of these, the meaning of "temporary" in Article VIII, has already been discussed. Another was the meaning of "advantageously" in the clause providing that the Commission could dispense with equal division of rights among the parties where such division could not be made advantageously. The Commission did not go into the meaning of the word, accepting the uncontradicted evidence of engineers on the point. It was also argued that the approval of the Dominion and the United States required by the Article must be obtained before the Commission approved the works, but the Commission found no merit in this contention though as already seen, it made its approval conditional on the approval of both governments.

In 1931, the Commission on the further application of the companies increased the maximum permissible water levels from 202 to 203.5 (mean sea level datum).⁸³

In 1919, Canadian Cotton Limited applied for approval of the construction of a power house and the necessary excavations in the bed of the St. Croix River on the United States side opposite Milltown, New Brunswick, and for permission to make the diversion of the river occasioned thereby.⁸⁴ The company operated mills and a power plant on the Canadian side of the river. The proposed power plant was intended to furnish power to the Canadian mills, it being intended to discontinue almost entirely the existing Canadian power plant. The Dominion indicated it would have no objections, provided the Commission's approval was made subject to the following conditions: (1) that the diversion through the proposed power plant be limited to one-half the flow of the river; (2) that the Canadian plant be either continued or modernized to meet the new conditions in the mill. However, the application was withdrawn by the applicants.

Subsequently in 1934, the company again applied for approval of the construction of a power house in Maine opposite Milltown, New Brunswick. It sought permission to repair and reconstruct the old dam there.⁸⁵ This application was made, *ex abundante cautela*, since it was thought the repairs would not modify the level or flow of the river. The Commission assumed jurisdiction and granted permission, placing the operation of the dam under the control of the International St. Croix River Board of Control. To give jurisdiction to the Commission, Article III requires that the level or flow of waters be affected. However, in a subsequent case (George B. Byrum)⁸⁶ it was argued that the effect of repairing an old dam would necessarily be to make it more watertight, and consequently to raise the level of the water, however slightly. If this were so the repair of dams constructed on boundary waters before the treaty, of which there are several on the St. Croix, would fall within the jurisdiction of the International Joint Commission.

83. I.J.C. Docket No. 28; see Bloomfield and Fitzgerald, *ibid.*, p. 141.

84. I.J.C. Docket No. 16; see Bloomfield and Fitzgerald, *ibid.*, p. 106.

85. I.J.C. Docket No. 32; see Bloomfield and Fitzgerald, *ibid.*, p. 145.

86. I.J.C. Docket No. 36; see Bloomfield and Fitzgerald, *ibid.*, pp. 148-9.

Canadian Cottons Limited figured in yet another application to the Commission, the St. Croix River Fishways Application.⁸⁷ There the Commissioner of Inland Fisheries and Game of the State of Maine applied to the Commission to permit all dam owners on the St. Croix River to erect such fishways as might be approved by the applicant and the legal representative of the Dominion. The applicant adduced evidence to show that fishways had existed in the river since 1867 (i.e. well before the Boundary Waters Treaty was entered into); that the fishways of the St. Croix Gas Light Company at tidewater and that in the dam of Canadian Cottons Limited had become useless; and that new fishways were required in both dams. Canadian Cottons Limited argued against the application on the ground that the number of fish did not warrant the cost of the fishways and that there were no suitable spawning grounds above its dam. No objection to the application was made by the United States or the Dominion, and the Commission, after considering the evidence, approved the construction and repair of the fishways in both dams. Chacko has suggested that while the Commission does not have jurisdiction over diversions permitted before the treaty or subsequently permitted by special agreement (these being expressly excepted by Article III), nonetheless it would have jurisdiction over alterations, reconstructions or repairs in existing uses.⁸⁸ Certainly it would require little extension of the arguments made to the Commission in the George B. Byrum Reference to justify this conclusion.

A further application to the Commission under Article III relating to the St. Croix River is the application of the St. Croix Power Company for approval of the construction of a storage dam in the river at Vanceboro, Maine, and St. Croix, New Brunswick, made on March 3, 1964.⁸⁹ At that time the dam at the outlet of Spednik Lake (one of the Chiputneticook Lakes) into the St. Croix, which was owned on the American side by the applicant and on the Canadian side by its wholly owned subsidiary, St. Croix Water Power Company, had so deteriorated that its replacement was necessary. Accordingly, application was made to construct a new dam there, the water to be used for generating power for the applicant's plant at Grand Falls and Woodland, Maine, and the New Brunswick Electric Power Commission's plant at Milltown, New Brunswick. No objection was made by Canada or the United States, and a number of persons affected by the levels of Spednik Lake favoured construction to stabilize the level of the lake. The Commission approved the works on October, 15, 1965, subject to a large number of conditions. These, *inter alia*, prescribed the location of the dam and its character, required the construction of fishways, required appropriate authorization from Canadian and American authorities, made provision for the maintenance of specified levels and flows, and required the company to continue operating its dam at the foot of East Grand Lake near Forest City, Maine, so as to maintain specified flows and levels in East Grand Lake. The International St. Croix River Board of Control was instructed to ensure compliance with the order of approval and to keep the Commission informed. The American company was

87. I.J.C. Docket No. 18; see Bloomfield and Fitzgerald, *ibid.*, pp. 111-2.

88. Chirokaikan Joseph Chacko, *The International Joint Commission between the United States and the Dominion of Canada* (New York, 1932), p. 119.

89. I.J.C. Docket No. 80.

made responsible for indemnifying persons or property suffering damages on the United States side by reason of the construction and maintenance of the works, and the Canadian company was made responsible for similar claims arising in Canada. Finally the Commission retained jurisdiction so that, if it deemed it appropriate, it might make further orders.

The last application to the Commission under Article III relating to the St. Croix River was made on July 1, 1967 seeking approval of a new concrete storage dam at the outlet of East Grand Lake near Forest City, Maine and Forest City, New Brunswick to replace an existing dam built in 1949 of squared untreated timber, the waters impounded by this dam to be used for the generation of hydro-electric power at the applicant's plants at Grand Falls, Maine and at the New Brunswick Electric Power Commission's plant at Milltown, New Brunswick.⁹⁰ The Commission approved the construction, maintenance and operation of the dam on October 11, 1968 subject to a number of conditions, but the approval was made subject to acceptance by the applicant within thirty days. The following month the applicant notified the Commission that it did not accept the order of approval, so that a new application will have to be made if the old dam is to be replaced.

Applications for Approval Under Article IV

Under Article IV of the treaty, three applications have been made in relation to the Saint John River. All three dealt with the power dam at Grand Falls, New Brunswick. As already mentioned the site of the dam was in New Brunswick, three miles below the point where the river ceases to be the international boundary, and the work called for ponding the water back for 32 miles, 29 miles being along the international section. Since this pond, of course, raised the level of water in Maine, Article IV required the approval of the Commission to the project.

As already mentioned, the United States claimed that it was entitled to share in half the power attributable to the flow along the international section multiplied by the fall along that section. Quite apart from any rights of private parties to the land, it was argued, the river constituted a resource partially located in the United States and consequently the United States and Maine were entitled to share in the power at normal prices. Canada opposed the contention, but the Commission found it unnecessary to decide the principle, the applicant having agreed to supply 2,000 H.P. in Maine at prices similar to those charged to like consumers in New Brunswick. However, the right of the parties to reopen the question was reserved if the 2,000 H.P. ceased to be available for use in the United States, and the applicant was given the right to apply to the Commission at any time for relief from this undertaking.

The Commission, therefore, issued an order of approval subject to this condition.⁹¹ In addition, the applicant was required to comply with a number of scheduled agreements with affected parties, and to make adequate provision for

90. I.J.C. Docket No. 87.

91. I.J.C. Docket No. 19; see Bloomfield and Fitzgerald, *Boundary Waters Problems of Canada and the United States (The International Joint Commission, 1912-1958)* (Toronto, 1958), pp. 113-5.

indemnifying against injury all other interests on either side of the boundary. Moreover the Commission reserved to all parties claiming injury the right to apply for such further order or action respecting such claim as might seem proper. Finally, the works were to be so constructed that no reduction in the quantity of water flowing along the international section would be affected at all flood stages, and when the level of water just above the dam should exceed 427.26 (mean sea level datum) the sluices and other works were to be opened to reduce it to that level.

By virtue of a New Brunswick statute of 1926, the rights of the New Brunswick Electric Power Commission respecting the project were transferred to the Saint John River Power Company; thereupon the latter company applied for the approval of the Commission to carry out the project. The order of approval was granted subject to similar conditions as those previously mentioned.⁹²

Among the conditions in the 1926 approval was one in which the Commission reserved jurisdiction in instances mentioned in two agreements, one of which was with the Madawaska Company. That agreement provided, *inter alia*, that the volume of water should be maintained at its natural condition near the Madawaska Company's property and on failure to do so the matter should be referred to arbitration. If the award was not paid the company might defer the matter to the Commission for such order as it might deem equitable. In 1931 the Madawaska Company, without going through its government, applied to the Commission to give directions to the Saint John River Power Company concerning the maintenance of the water levels, but the Commission declined to make the order on the ground that it lacked jurisdiction.⁹³ The Commission did not give any reasons for its finding, but it must have acted on one of the grounds against jurisdiction argued before it. These grounds were as follows. In the first place, it was contended that the applicant was bound to proceed through his government. However, in the George B. Byrum⁹⁴ application some years later, the applicant also proceeded directly and the Commission there issued an interim order. But the interim order in that case really did no more than tell the applicant what steps he ought to take, and while it supports the view, it does not amount to an adoption of the rule that a private individual may proceed before the Commission without the intervention of his government. Such a procedure is in any event contrary to the Rule 12(2) of the Commission's Rules of Procedure.⁹⁵

Further arguments made against jurisdiction were that to accede to the application would amount to issuing an order in the nature of a mandatory injunction against a Canadian citizen in respect of a use of water and the operation of a plant wholly within Canada. The application did not come within the instances mentioned in the agreement. And except as to conditions laid down, the Commission did not have power to review its decisions; otherwise a party who had been given approval might be inhibited from acting since he would never know where he stood.

92. I.J.C. Docket No. 22; see Bloomfield and Fitzgerald, *ibid.*, p. 121.

93. I.J.C. Docket No. 31; see Bloomfield and Fitzgerald, *ibid.*, pp. 142-4.

94. I.J.C. Docket No. 36; see Bloomfield and Fitzgerald, *ibid.*, pp. 148-9.

95. *International Joint Commission, United States and Canada, Rules of Procedure and Text of Treaty* (Ottawa, Washington, 1965), p. 6.

References Under Article IX

Under Article IX, the investigative power of the Commission, two references have been made directly relating to the Saint John River and one relating to the St. Croix. In addition the Passamaquoddy Tidal Power references are, of course, relevant to the development of both rivers.

The first reference affecting the Saint John River is that relating to the pollution of boundary waters filed in 1912.⁹⁶ Among the waters studied were those of the Saint John River where it forms the international boundary. In its final report of 1918, the Commission found that even at that early date, the Saint John River from Grand Falls to Edmundston, New Brunswick, in common with the other boundary rivers studied, were polluted to an extent that the water in its unpurified state was unfit for drinking, the pollution resulting, *inter alia*, from sewage, mill waste and garbage discharged in the water in contravention of the treaty. The Commission thought it feasible and practicable, without unduly burdening the communities responsible, to prevent or remedy the pollution in boundary and transboundary waters. The Commission further considered it should be given adequate jurisdiction to regulate and prohibit pollution in such waters. Following the report, both governments on March 11, 1919, requested the Commission to draft either reciprocal legislation or a treaty for carrying out the recommendations accompanying its final report. The Commission chose the second alternative and prepared a draft treaty, but it was never implemented.

The next reference involving the Saint John River was the request made by the governments of Canada and the United States on September 28, 1950 (as amended on July 7, 1952) to determine and recommend projects for the conservation and regulation of waters in the Saint John River system which in the Commission's judgment would be practical in the public interest.⁹⁷ The Commission was asked to indicate how the interests on either side of the boundary would be affected; to estimate the costs of proposed works and projects, including necessary remedial works, and of the indemnification for damages caused; and to indicate how these costs should be apportioned between the two governments.

To carry out the engineering studies, the Commission appointed the International Saint John River Engineering Board composed of representatives of both countries. The Board on April 6, 1953, filed a comprehensive interim report in which alternative possibilities for large scale development were presented.⁹⁸ "Some of these," as the Commission pointed out, "are entirely national in character, some are definitely international, some are physically national in character and economically international, and all could form integral parts of a power system offering benefits to the local area of both countries." The Commission considered it untimely to make precise recommendations on a development program pending

96. I.J.C. Docket No. 4; see Bloomfield and Fitzgerald, *Boundary Waters Problems of Canada and the United States (The International Joint Commission 1912-1958)*, (Toronto, 1958), pp. 76-7.

97. I.J.C. Docket No. 63; see Bloomfield and Fitzgerald, *ibid.*, pp. 186-7; Fitzgerald, "Legal Aspects of the Power Development of the Saint John River Basin" (1959), 12 U.N.B. Law Jo. 7, at p. 25.

98. *Water Resources of the Saint John River Basin—Quebec—Maine—New Brunswick—Interim Report to the International Joint Commission (Under Reference of 7 July, 1952) by the International Saint John River Engineering Board*, 6 April, 1953.

definite proposals for undertaking particular projects when it made its interim report on January 27, 1954. It did, however, formulate a number of conclusions pertinent to the international aspects of the matter. Among these were that: the demand for power in the area over the next few years would exceed the capacity of then existing installations; there were a number of storage and hydro-power sites that could be developed more economically than thermal power; among the possibilities for meeting increased power demands were: (a) interconnection of transmission systems on both sides of the boundary, (b) the construction of the Beechwood power project, and (c) provision of 500,000 to 600,000 acre feet of reservoir storage sites upstream from Grand Falls, New Brunswick. These developments it was thought would meet prospective normal increases in demand for power through 1961. A number of steps have been taken in accordance with these recommendations of the Commission. The Beechwood project has been completed; so is the far more extensive Mactaquac project, though it is not yet fully equipped with generating and transmission facilities. Moreover action has been taken on both sides of the boundary to provide electrical interconnections. Maine repealed the Fernald Act prohibiting the export of hydro-electric power from the state, and the Canadian Department of Trade and Commerce took steps to permit the interconnection and exportation of electric energy.

The Commission noted that a number of storage and power development possibilities in the basin have international aspects that may require consideration by it when definite proposals are advanced. In relation to upstream storage resulting in downstream benefits, the Commission made the following remarks regarding the apportionment of benefits and costs:

In the matter of headwater storage reservoirs beneficial to downstream hydro-electric plants in the Saint John River basin the Governments of the United States and Canada should, when both are concerned, consider each case *de novo* and separately on its merits, recognizing that a settlement basis adjudged satisfactory in one case might be inequitable in other cases even in the same basin, and more particularly in cases arising in other river basins along the common frontier; hence, there should be an understanding between the two Governments to the effect that decisions with respect to cases of this type in the Saint John River basin should not necessarily be regarded as precedents in the consideration and disposition of other headwater-benefits situations in that basin or in other river basins lying partly in Canada and partly in the United States along the international boundary. This statement relates only to headwater storage reservoirs located entirely within one Country or the other and to situations covered under Article III of the Treaty but not to situations which would arise under Article IV of the Treaty, this latter aspect not having been considered by the Commission in formulating this conclusion.

It goes without saying that this statement is of great significance in assessing the experience on the Columbia River.

Finally, the Commission concluded that there was at the time little need or prospect of significant development of resources of the river for purposes other than power. Since then, however, a project for an important recreational development in connection with the Mactaquac Project has been approved by the Canadian federal government and New Brunswick.

The reference has been kept open since 1954, and the International Saint John River Engineering Board has since that year given annual reports of developments to the Commission.

In 1955 a similar application was made to the Commission in relation to the St. Croix River.⁹⁹ Here again the Commission appointed a board, the International St. Croix River Engineering Board, to carry out the necessary investigations and study. The Board made a comprehensive report on preliminary investigations to the Commission in September, 1957, with a supplementary statement in December of the same year.¹⁰⁰ The report contains extensive factual data and recommendations involving a multi-purpose development of the river, including considerations respecting power, fishing, recreation and other uses, and pollution. Following this report, public hearings were held by the Commission concerning the report before it made its own report on October 7, 1959.

In its report, the Commission concluded that further development of the water resources of the river is in the public interest from the point of view of the Canadian and American governments. A multiple purpose programme for such development, it concluded, should include (a) the adoption of highwater elevations of East Grand and Spednik Lakes, (b) the operation of storage reservoirs and regulation of stream-flow with due regard to all water uses, (c) the maintenance and improvement of inland fishery resources, (d) the restoration of anadromous fish runs, (e) the establishment of water quality objectives and the abatement of the various types of pollution, (f) the redevelopment of the hydro-electric plant at Milltown, and (g) the further development of recreational facilities.

Specific proposals and recommendations for implementing these proposals were then set forth. In particular, the Commission recommended that it be authorized to maintain continuing supervision over boundary waters pollution in the basin through a technical advisory board. In carrying out this function the Commission should notify those responsible for any pollution objectionable in the light of objectives for boundary waters quality control set forth in the Commission's report of October 11, 1950 on the pollution of boundary waters, and if assurance is not received within a reasonable time that the pollution will be corrected, it should make recommendations to the appropriate authority as to any action deemed desirable. The Commission further recommended that it be authorized to review the possibility of restoring anadromous fish runs when water conditions improve as a result of its recommendation regarding pollution, and that all new construction in dams on the river should provide for the ultimate inclusion of facilities necessary for the restoration of anadromous fish runs. Finally, in order to achieve a more equitable allocation of power resources of the basin between the two countries, the Commission recommended that any development of the Milltown site for power and other purposes should be carried out by Canadian interest, but without prejudice to any mutually satisfactory arrangements for interconnection and use of the power produced. As in the Saint John reference, the Commission was authorized to continue studies and make recommendations when appropriate.

99. I.J.C. Docket No. 71.

100. *Water Resources of the St. Croix River Basin—Maine—New Brunswick—Report on Preliminary Investigations to the International Joint Commission (Under Reference of 10 June, 1955) by the International St. Croix Engineering Board, September, 1957; Supplementary Statement, December, 1957.*

The investigation by the Commission of the International Passamaquoddy Tidal Power Project is also relevant to the Saint John River.¹⁰¹ The Commission studied the whole project from an engineering, fisheries and economic point of view. The engineering¹⁰² and fisheries¹⁰³ studies indicated the feasibility of the project, but the economic considerations raised more difficulty. Because of the variation of the tide, a tidal power project, though potentially having a vast maximum capacity, provides a relatively small quantity of firm power. Accordingly supplemental power must be found to produce a constant source of power. The International Passamaquoddy Engineering Board, established by the Commission to study the matter, found that the most favourable economic result could be obtained by a two pool tidal system involving Passamaquoddy and Cobscook Bays combined with a hydro-electric auxiliary plant at Rankin Rapids on the Saint John River. The Board considered the combined project economically justified if constructed entirely by the United States at an interest rate of 2½%, the United States rate for such projects. But the Commission rejected this conclusion largely on the ground that the combined project seemed to be economically feasible only because the Board had added to the uneconomic tidal project the economically feasible Rankin Rapids project. In the report the Rankin Rapids project and the benefits to sites downstream resulting from storage there received careful evaluation.

101. I.J.C. Docket No. 72; see Docket No. 60. See G. V. La Forest, "Boundary Waters Problems in the East" in Deener (ed.), *Canada-United States Treaty Relations* (Durham, N.C. 1963), p. 28, at pp. 44-9.

102. *Investigation of the International Passamaquoddy Tidal Project*, a Brochure summarizing the Report to the International Joint Commission by the International Passamaquoddy Engineering Board (Ottawa, Washington, 1959).

103. *International Passamaquoddy Fisheries Board Report to the International Joint Commission* (Ottawa, Washington, 1959).

PART VI

Surface and Ground Water

CHAPTER EIGHTEEN

Surface Water at Common Law

By Alan D. Reid

DISTINCTION BETWEEN A WATERCOURSE AND SURFACE WATER

At common law, water lying in a lake or pond and water flowing in a river, stream or other watercourse is subject to the doctrine of riparian rights.¹ Different rules apply, however, to surface water. Since legal rights in water are dependent upon the classification adopted, it is important to determine how the law differentiates between these classes of flow. A major problem arises in distinguishing surface water from water flowing in a natural watercourse. In many cases the distinction is obvious; a person generally knows a river when he sees one. But in other cases the distinction is more subtle; the classification of a lesser flow of water running inconsistently through the course of the year raises more difficult problems. In discussing the distinction, frequent references will be made to the precise language of many of the leading decisions.

Conceptually, the distinction between these two classes of water seems to be based on such considerations as whether the flow can be perceived to be of economic benefit to an appreciable segment of the community, and whether this common benefit is clearly enough defined to be capable of judicial enforcement. The cases indicate that if a flow of water exhibits characteristics of permanence, so as to be seen to be of perennial benefit to the land through which it makes its course, it will be classified as a natural watercourse.

On the other hand, surface water is the natural drainage of water across the surface of land in flows and accumulations of insufficient magnitude or permanence to warrant the application of the doctrine of riparian rights. It encompasses rain water and snow-melt draining from higher lands to lower lands, water running off streets and buildings, water insignificantly seeking its way across the surface of the land towards well-defined natural watercourses. Surface water has been defined in *Corpus Juris Secundum* in the following manner:

Surface waters are those which fall on the land from the skies or arise in springs, and diffuse themselves over the surface of the ground, following no defined course or channel, and not gathering into or forming any more definite body of water than a mere bog or marsh, and are lost by being diffused over the ground through percolation, evaporation, or natural drainage.²

1. See Chapter Ten.

2. 93 C.J.S., pp. 799-800.

The judicial approach has been to enunciate criteria for classifying water as a natural watercourse. By a process of exhaustion, water that fails to meet these criteria is classified as casual surface water. In an early case, *Rex v. The Inhabitants of Oxfordshire*,³ a natural watercourse was described as "water flowing in a channel between banks more or less defined". The importance of the "defined" nature of a stream was later emphasized in the Manitoba case of *Wilton v. Murray*:

A watercourse has been defined to consist of bed, banks and water; and, while the flow of water need not be continuous or constant, the bed and banks must be defined and distinct enough to form a channel or course that can be seen as a permanent landmark on the ground. Here, however, there is no evidence of the water flowing in a course with defined and visible banks; and, on the facts shown by the evidence, the case seems to be one of the drainage of surface water over an extensive surface area....⁴

In this case, snow melting on lands above the plaintiff's property flowed through a natural depression of varying width. The court held that it is not sufficient that the extremities of the flow may be detected as, for example, by rubbish lines clearly demarking the extent of the flow. What was stressed as fundamental was that some evidence of the permanence of the flow be shown; a cutting of the soil is a normal requirement. This point was made as well in the Alberta case of *Makowecki v. Yachimyc*,⁵ where a distinction was drawn between a watercourse "in the sense of flowing stream with a definite channel, with a distinct bed and distinct banks or edges formed by the water cutting the soil", and a watercourse "in the sense of surface water coming from rains and melting snow... flowing in a definite channel provided by natural gullies or ravines or depressions, but in which, when the water is not flowing, there is no distinct bed or at any time any cutting of the soil, so as thus to mark the banks or edges of the channel, though doubtless in such cases a careful examination of the soil would shew the height to which the water rose on the last occasion and probably the line of its usual height."⁶ The court emphasized that riparian rights apply only to the first class of flow.

It is of some assistance, as well, to have regard to the means by which water may be obstructed. Where, as in *Murray v. Dawson*,⁷ the flow is obstructed by the ordinary cultivation of the land, there is evidence that the water is casual surface water. Similarly, the fact that the soil through which the water flows is suitable for cultivation during the growing season is evidence that the flow is merely surface water.⁸ In both these instances, the cultivability of the soil seems to be inconsistent with the characteristics of permanence required of a natural watercourse.

Quite naturally, the emphasis on permanence has led courts to demand evidence of a permanent natural source for the flow before classifying water as a

3. (1830), 1 B. & Ad. 289, at p. 301; 109 E.R. 794, at p. 799.

4. (1897), 12 Man. R. 35, at pp. 38-9. See also *Lee v. Rural Municipality of Arthur* (1965), 52 D.L.R. (2d) 263; *Chanas v. Rural Municipality of St. Clements* (1967), 63 D.L.R. (2d) 625.

5. (1917), 34 D.L.R. 130.

6. *Ibid.*, at p. 140; see also *Williams v. Richards* (1893), 23 O.R. 651.

7. (1869), 19 U.C.C.P. 314; see also *Wilton v. Murray* (1897), 12 Man. R. 35.

8. This was adduced in evidence in *McGillivray v. Millin* (1867), 27 U.C.Q.B. 62, but it is impossible to determine whether any significance was attached to it by the jury at trial.

natural watercourse. For instance, in *McGillivray v. Millin*,⁹ water flowed through a slight depression in the surface of the soil, irregular in width. There were no defined banks, though a course could be perceived. The court suggested that where the flow is merely drainage of melting snow and seasonal rainfall, in contrast to a flow emanating from a spring, it is properly classified as casual surface water. Proof of such a source is not seen universally as a requirement, however, especially where other indicia of permanence are present. This point was made in *Beer v. Stroud*,¹⁰ where the defendant had obstructed surface water draining through a natural outlet onto his land:

To this end it is not essential that the supply of water should be continuous, and from a perennial living source. It is enough if the flow arises periodically from natural causes and reaches a plainly-defined channel of a permanent character. Thus a recognized "course" is obtained, which is originated and ascertained and perpetuated by the action of the water itself. For all practical definition, if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and defined channel, that constitutes a water-course.¹¹

Further support for this proposition can be found in *Briscoe v. Drought*:

If it is proved that rain-water forms itself, from the nature of the locality upon which it descends, into a visible stream, and as far back as memory can extend, has pursued a fixed and definite channel for its discharge, the 'volume' of the stream may be 'occasional' and 'temporary'; but its 'course' is neither 'occasional' nor 'temporary'. I am, therefore, of opinion that, in this case, there was a water-course¹²

It has elsewhere been suggested that all water contained within natural confines, whether a self-created channel or a natural surface depression, must be classified as a natural watercourse. The effect of this proposition is that only water flowing in an *unconfined* or *unrestricted* manner can be classified as surface water, an apparent extension of the approach discussed thus far. In *Townsend v. Canadian Northern Railway Co.*,¹³ a railway company raised the grade of its rails and created an embankment, obstructing the natural drainage of surface water from the plaintiffs' properties to the river. The drainage followed a natural runway in the soil. In order to succeed, the plaintiffs had to establish that the drainage flow constituted a natural watercourse. In upholding the plaintiffs' claims, Clarke J.A. said:

If in order to constitute a watercourse it is necessary as has been held in some cases, that there be a perennial living stream, flowing within defined cut banks for its whole length, or one or other of such conditions then the course now in question is not a watercourse, but if it is sufficient that the accumulation of water from rains and snow flows in a regular course through depressions in the land to an outlet then I think the drainage course in question is a watercourse within the meaning of the law. The latter view is the one adopted in this province for conditions similar to those in question in this action.¹⁴

It is clear that the court was motivated by the fact that, if a different view prevailed, the plaintiff would have no lawful means of draining his land. To some extent, then, the outcome reflected a policy choice imposed by the particular

9. (1867), 27 U.C.Q.B. 62.

10. (1890), 19 O.R. 10.

11. *Ibid.*, at p. 18. See also *Arthur v. G.T.R.* (1895), 22 O.A.R. 89.

12. (1860), 11 Ir. C.L.R. 250, at p. 264.

13. [1922] 1 W.W.R. 1121.

14. *Ibid.*, at p. 1126.

situation. In attributing to this flow the status of a watercourse, the Alberta Court of Appeal purported to follow its earlier decision in the *Makowecki* case.¹⁵ There appears, however, to be some misapprehension as to the significance of the distinction made by Beck J. in that case between a natural watercourse, and surface water following a natural course; clearly the watercourse in the *Townsend* case was not one to which riparian rights would attach under Beck J.'s classification in the *Makowecki* case. What the latter case really decided was that drainage, or surface water flowing in a natural course, cannot be obstructed, a point to be discussed later. The *Makowecki* case cannot properly be cited for the proposition that a natural watercourse or stream classification will attach to water merely because it flows in a natural runway. If the *Townsend* case does say this, it takes at best a minority position.¹⁶ The consensus remains that indicia of permanence are the essential criteria for classifying water as a natural watercourse or stream.

A problem may arise in classifying water flowing in a natural watercourse that spreads out into a slough or swamp then resumes its courses between well-defined banks at a later stage. Such water has normally been classified as a natural watercourse even during its interim passage through the swamp as long as a current can be detected precipitating the ultimate recapture of the water between well-defined banks. The point was raised directly in *Hudson's Bay Company v. Horanin*, where Mathers C. J. K. B. said:

...the mere fact that for a short distance a natural watercourse expands into a slough or swamp through which no defined banks can be traced does not deprive it of the character of a watercourse throughout, if through this expansion there is a current from a higher to a lower level. In this area there is a fall of about 4 ft. to the mile and the water flowed in a noticeable current.

In all cases the decision has been that a natural watercourse which swells out into a pond, swamp or meadow with a current retains its character of a watercourse throughout.¹⁷

The same point was made in *Parr v. Troop*.¹⁸ On the other hand, water found in a channel worn by occasional overflows of a stream, but not being a part of the water flowing in the stream itself, has been held to be mere surface water.¹⁹

Water flowing in an artificial ditch is not regarded as a natural watercourse.²⁰ There is, however, some suggestion that where there is evidence to indicate that an artificial watercourse has been constructed with a view to becoming a permanent waterway, the rules applicable to natural watercourses will apply. For instance, the Rideau canal has been held to be a watercourse to which the doctrine of riparian rights applies.²¹ And where an artificial watercourse is created by

15. *Makowecki v. Yachimyc* (1917), 34 D.L.R. 130, discussed at pp. 385-6.

16. The *Townsend* case was not considered to represent the common law in *Dickenson v. Rural Municipality of St. Andrews*, [1923] 3 W.W.R. 961, at p. 974, per Trueman J. A., or in *Brown v. Town of Morden* (1958), 24 W.W.R. 200, at p. 206.

17. [1926] 1 D.L.R. 725, at pp. 727-8.

18. (1922), 55 N.S.R. 252, at p. 256.

19. *Hill v. Buffalo & Lake Huron Ry. Co.* (1864), 10 Gr. 506.

20. *Oliver v. Lockie* (1894), 26 O.R. 28; *Jukes v. Rural Municipality of Coldwell*, [1927] 1 D.L.R. 82; *Marchischuk v. Lee*, [1954] 2 D.L.R. 484.

21. *Gardiner v. Chapman* (1884), 6 O.R. 272; see also *Geall v. Richmond*, [1932] 4 D.L.R. 796, at p. 797, suggesting that where an artificial stream is intended to be permanent it may be governed by the same rules as apply to a natural stream. Support may possibly be found as well in *Buchanan v. Ingersoll Waterworks Co.* (1898), 30 O.R. 456; but see *Nield v. London and North Western Railway Co.* (1874), 10 Ex. 4, where it was said that a canal owner does not have the duty of a riparian owner not to impede the flow in the canal.

splitting a stream, so that the natural flow continues, but in an artificial channel, the flow has been treated as the equivalent of a natural watercourse with the rights and obligations attendant thereto.²² Where, however, the flow in question is an artificial watercourse such as a mill-race, or a mere cut from a stream, the general rule seems to be that the basis for all water rights must be found in a grant or an easement, either express or presumed from user.²³ Regard must be had to the circumstances surrounding the existence of the artificial watercourse, and emphasis must be placed on such questions as whether the watercourse is temporary or permanent, the circumstances under which it was built, and the manner in which it has been used and enjoyed.²⁴ From this it may be possible to infer that the intention was to confer upon all riparian owners rights of easement equivalent to usual riparian rights.²⁵

Before presuming to make any general observations as to the classification of a watercourse, it would seem relevant to bear in mind an observation made by Beck J. in the Alberta case of *Oliver v. Francis*;²⁶ he suggested that the application of general principles may properly differ from jurisdiction to jurisdiction. The truth is that it is extremely difficult to lay down a categorical definition of surface water, or of a natural watercourse. Local situations, customs, usages and requirements play no small part in establishing the classification of a particular flow. This point was further brought home in the Nova Scotia case of *Parr v. Troop*.²⁷ In that case, water originated in a hilly sector of the province, found its way onto the property of the defendant across which it flowed through a covered drain on the plaintiff's property. The defendant stopped the natural flow, causing the water to be diverted across the plaintiff's property. The defendant contended that since this was surface water rather than water flowing in a defined watercourse, the obstruction was not actionable. Rogers J., speaking for the court, did not accept this argument, regarding the flow as a characteristic Nova Scotia stream:

The indisputable facts as well as the geography of the case, are, however, . . . against these contentions. The watercourse takes its rise in the North Mountain and collecting water as it proceeds to find an outlet in the Annapolis River, crosses in a well-defined course in turn lands of Crosscup, Troop, Lamb and Parr, and enters a road where now it is taken care of on its way to the river by means of a culvert under the care of the municipal authorities. The stream is one of a type common in the hilly country of Nova Scotia, a small brook full of water only during the spring and fall freshets and in times of heavy rainfall. It is none the less well defined—the waters could not find their outlet other than through the Troop-Lamb-Parr lands The waters here, as well as on the lands below, are contained by the slope of the land on both sides, even in time of extraordinary floods, and must find their way through to plaintiff's lands.²⁸

22. See *Stockport Waterworks Co. v. Potter* (1864), 3 H. & C. 300, at p. 327; 159 E.R. 545, at p. 556; *Nuttall v. Bracewell* (1866), 2 Ex. 1, at pp. 13-4; *Diamond v. Reddick* (1875), 36 U.C.Q.B. 391; *Keewatin Power Co. Ltd. v. Lake of the Woods Mllg. Co. Ltd.*, [1930] 4 D.L.R. 961, at pp. 969-70.

23. *Baily & Co. v. Clark, Son & Morland*, [1902] 1 Ch. 649, at p. 664, per Vaughan Williams L.J.
24. *Ibid.*, at p. 668, per Stirling L.J.

25. *Ibid.*, at p. 664, per Vaughan Williams L.J.; *St. Mary's Milling Co. v. Town of St. Mary's* (1916), 32 D.L.R. 105; *Keewatin Power Co. Ltd. v. Lake of the Woods Mllg Co. Ltd.*, [1930] 4 D.L.R. 961 (P.C.).

26. (1919), 14 Alta L.R. 509.

27. (1922), 55 N.S.R. 252.

28. *Ibid.*, at pp. 255-6.

The cases discussed in this section illustrate some of the varied criteria which courts have employed to determine whether water is to be treated as a water-course or as mere surface water. What is apparent is that the distinction has been rather vaguely articulated. Bound up in the technical language is a significant policy outlook, a recognition that the ramifications of the classification adopted may be severely detrimental to an interest that is considered vitally important. The conceptual basis for the distinction, outlined at the outset, is reasonably clear to grasp; so is the practical distinction between flows at the extremities of either classification, the river on the one hand, and rainwater seeping across the land on the other. But in the middle range between the two extremities lie a number of difficult situations which defy precise classification, and frustrate demands for clarity and certainty in the law.

SURFACE WATER ACCUMULATION

Perspective

The development of surface water resources entails the accumulation of water in concentrated supplies sufficient to be of economic value. In general terms, the process involves a cycle—accumulation, storage, redistribution, and accumulation.

The process raises questions as to the legal effect of the diversion of surface water, in many cases a preliminary step to its accumulation. It is relevant, therefore, to examine the general principles applicable to this aspect of the surface water problem. It would seem appropriate that the law be looked at from two standpoints. First, from the standpoint of the party seeking to capture and utilize the resource, it is relevant to examine rights at common law to appropriate water, and the liability one may incur to other persons in the course of accumulating it. Second, from the standpoint of a person interfering with programs designed to accumulate surface water, it is necessary to determine activities that may be undertaken without incurring liability to a person seeking to accumulate the water. The relevant principles are discussed in the sections following.

The Natural Drainage Principle

The starting point for any discussion relating to the rights and liabilities arising in respect of surface water is the natural drainage principle. This principle recognizes that higher land may drain onto lower land through the forces of nature without giving a cause of action to the holder of the lower land for injury resulting from the flow.²⁹ The law does not impose an obligation on the holder of land to construct a system of drainage to prevent the natural flow of surface water from encroaching on adjoining property. On the other hand, he does not have any *right* to have his land drain naturally onto lower land; the lower land owes no servitude to receive natural drainage, and the common law position is that natural drainage may be repelled.³⁰ Conversely, the lower landholder has no right to the continuous flow of surface water.³¹

29. *Harrison v. Harrison* (1883), 16 N.S.R. 338.

30. For a more detailed examination of this proposition, see pp. 382-6.

31. This is apparent from the discussion at pp. 378-9.

It is clear as well that a right to drain through the operation of nature cannot be prescribed; the mere passage of time will never confer upon a higher landholder an absolute right to demand that his land continue to be drained through the lower land, or upon a lower landholder a right to demand that he continue to receive the flow. Natural drainage is at best a qualified right that is subject to a power to interfere that may be exercised at any time by either landholder. There is no basis upon which either landholder may argue that there exists a presumption, through contiguous drainage, that this is a right long conferred upon him by grant, a usual basis for prescription in law; for natural drainage is an incident of the land itself and not a matter susceptible of a grant.³² Furthermore, because the process of natural drainage does not confer a right of action upon any person, a right to drainage, or to receive the flow, cannot be prescribed through the operation of a limitation statute, another basis for prescription in law; normally this would arise where a landholder had failed to exercise a right of action in respect of an actionable interference for a period of time exceeding the prescribed statutory period; as no right of action exists, there is no limitation period which can run.

Accordingly, while a landholder may properly exploit the process of natural drainage to collect surface water without incurring liability to the owner of the land over which it has previously flowed, no right to the continued flow can be acquired.

The Right of Appropriation

Surface water found within the boundaries of any property may be appropriated by the holder of the land without incurring liability to holders of land through which the water previously has flowed, or through which the water would subsequently have flowed had it not been appropriated.

In greater detail, one of the fundamental principles of the law of surface water is that there is no property interest in the resource while it is in a state of nature flowing freely across the terrain. However, the person in possession of the land across which surface water is flowing, or upon which it has accumulated, may appropriate the resource to his own uses. As was stated by Baron Alderson in *Broadbent v. Ramsbotham*:

No doubt, all the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which this water falls from dealing with it as he may please and appropriating it. He cannot, it is true, do so if the water has arrived at and is flowing in some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such a channel.³³

Although it was stated in *Graham v. Lister*³⁴ that "water on land, as long as it does not flow in some defined natural 'watercourse', is the property of the owner of the soil", it is somewhat inaccurate to describe his right as a "property" interest. His interest does not attach to the water itself until he actually appropriates it. It is more accurate to describe his interest as a mere right to appropriate surface water on his land.

32. *Harrison v. Harrison* (1883), 16 N.S.R. 338, at pp. 342-3; see also *Darby v. Crowland* (1876), 38 U.C.Q.B. 338.

33. (1856), 11 Ex. 602, at p. 615; 156 E.R. 971, at p. 976.

34. (1908-9), 9 W.L.R. 589.

A landholder's right to appropriate surface water may be exercised regardless of a reliance by a lower landholder upon the use of the water for irrigation or other purposes. Under the same rule, a landholder's interest may be pre-empted by an appropriation made by a landholder still further up the flow. It follows that a right to receive a surface water flow can never be prescribed through continuous use over a long period of time; the right to appropriate is an absolute right which can never be divested from the holder of the land upon which the water temporarily lies.

In some foreign jurisdictions,³⁵ the right to appropriate surface water is conditioned by a doctrine of reasonable user. This means that a landholder has the right to appropriate casual surface water within his boundaries as long as the appropriation is reasonable having regard to his own demands and those of his neighbours. Such a rule does not obtain, however, in the common law of the four Atlantic Provinces.

The key to the development of surface water resources, therefore, lies in the ability to capture the water on one's land so as to be in a position to legally appropriate it to one's purposes. However, no right of action exists in respect of an interference with such a project as long as the interference does not amount to anything more than an appropriation of the water by another owner within the boundaries of his own land.

Liability for Artificial Diversion

Surface water may not be diverted across adjacent lands by artificial means, and an attempt to transfer it by this process from one place to another across the land of another person will be actionable.

Programs for the accumulation of surface water resources may entail the artificial diversion of water across land and into designated reservoirs. Of fundamental importance, then, is the common law rule imposing liability on one who diverts surface water so as to cause it to flow across and injure adjoining property. Numerous cases have held that the owner whose land is afflicted by unfortunate circumstances cannot transfer the burden to his neighbour by casting water from his land onto his neighbour's land.³⁶ A person who constructs ditches, drains or culverts for the purpose of diverting water onto adjacent lands may be sued by his injured neighbour for damages, or may be made subject to an injunction restraining his action where it is of a continuing nature, or both,³⁷ whether the construction is effected by the owner or occupier of the land, or by someone else with his consent.³⁸ Similarly, any enlargement or deepening of a natural depression in the surface of the land so as to facilitate the flow of water onto adjacent

35. The doctrine is more usually raised in relation to ground water and discussed in Chapter Nineteen, especially at p. 409, but it would seem that the doctrine might apply equally where surface water is sought to be put to beneficial use by adjacent landholders.

36. For example, *Whalley v. Lancashire and Yorkshire Ry. Co.* (1884), 13 Q.B.D. 131; *Qualley v. Day*, [1929] 2 D.L.R. 928, at p. 931.

37. *Passmore v. City of Hamilton* (1906), 8 O.W.R. 82; *Messenger v. Miller* (1918), 52 N.S.R. 142; *Hudson's Bay Co. v. Horanin*, [1926] 1. D.L.R. 725; *Baker v. Daly*, [1926] 1 W.W.R. 71; *Jukes v. Rural Municipality of Coldwell*, [1927] 1. D.L.R. 82; *Qualley v. Day*, [1929] 2 D.L.R. 928; *Reid v. Township of Amabel*, [1936] O.W.N. 251; *Badger v. Cooper* (1952), 7 W.W.R. 529.

38. *Passmore v. City of Hamilton* (1906), 8 O.W.R. 82, at pp. 87-8.

property is actionable;³⁹ here, however, it is relevant to determine whether the excavation amounts to an interference with the natural state of the land, so as to be classed as an actionable diversion, or whether it amounts to a restoration of the land to its natural state. In this connection, it is clear that one may remove an adventitious obstruction to the natural flow, such as a beaver dam, even if the removal causes the surface water to resume a long deferred passage over adjacent property.⁴⁰ A landholder may even remove soil that has drifted into a natural runway, notwithstanding that he increases the flow across neighbouring land, if in doing so he is merely restoring the land to its natural state.⁴¹ However, the adventitious obstruction may not be removed where another party, relying on the continuance of the obstruction, has dealt with his land in such a way that he would be injured by the removal of the obstruction.⁴²

It is important to point out, however, that, technically, liability for the diversion of surface water is restricted to the extent that it constitutes an interference above and beyond the inconvenience or injury that would be caused in any event by the normal flow of the water. The measure of damages is the extent to which the injury is augmented by the interference with the flow, rather than the extent of injury actually suffered owing to the action of the surface water.⁴³ The onus, however, is placed upon the person causing the diversion to satisfy the court that it should sever from the claim an amount representing the injury which would have been suffered in any event in the course of natural drainage; if he can establish this, the defendant will not be held liable for the entire injury.⁴⁴ It appears, however, that where surface water is channelled into a drainage conduit resulting in an increase in the concentration of the flow onto neighbouring land, but not in an increase in the volume of surface water passing onto the property, the defendant cannot escape liability merely by establishing that no more water passed onto the plaintiff's land than would pass by natural drainage. For it is the destructive effect rather than the actual volume of the flow that is relevant; the issue is whether the defendant has so interfered with the flow as to cause an injury over and above that which would be caused by the natural flow.⁴⁵

39. *Qualley v. Day*, [1929] 2 D.L.R. 928; *Marchischuk v. Lee*, [1954] 2 D.L.R. 484; but see *Walker v. Westington* (1912), 23 O.W.R. 110, where Britton J. seems to suggest that an acceleration of the natural flow is not actionable where the flow is not actually diverted.

40. *Farnell v. Parks* (1918), 38 D.L.R. 17; *Parry v. Reid* (1920), 52 D.L.R. 491.

41. The question was raised but not discussed in *Qualley v. Day*, [1929] 2 D.L.R. 928, at pp. 930-1.

42. *Farnell v. Parks* (1918), 38 D.L.R. 17, at p. 21.

43. *Darby v. Crowland* (1876), 38 U.C.Q.B. 338; but see *McDonald v. Lester* (1890), 30 N.B.R. 137, where Tuck J., without discussion of authorities, rejected this argument by counsel; *Cardwell v. Breckenridge* (1913), 11 D.L.R. 461; *McCord v. The Alberta and Great Waterways Ry. Co.* (1918), 13 Alta. L.R. 476; *Mesenger v. Miller* (1918), 52 N.S.R. 142; *Oliver v. Francis* (1919), 14 Alta. L.R. 509; *Baker v. Daly*, [1926] 1 W.W.R. 71; *Marchischuk v. Lee*, [1954] 2 D.L.R. 484; *Skanes v. Town Council of Wabana* (1958), 12 D.L.R. (2d) 846.

44. *MacKenzie v. West Flamborough* (1899), 26 O.A.R. 198; *Kelley v. Can. Nor. Ry. Co.*, [1950] 2 D.L.R. 760; *Dyke v. Rosetown* (1956), 20 W.W.R. 1; *Brown v. Town of Morden* (1958), 24 W.W.R. 200.

45. *Reid v. Township of Amabel*, [1936] O.W.N. 251. In any event, in most instances in which a landowner employs artificial means to conduct drainage it would be difficult to argue that the volume of the flow has not thereby been increased; by concentrating water in an artificial course the possibility of escape through percolation, absorption, evaporation or other means is, under ordinary circumstances, reduced, thereby increasing the volume: see *Scrimger v. Town of Galt* (1914), 26 O.W.R. 53, at pp. 54-5.

The common law, then, places an obligation upon a landholder, seeking to drain his land, to do so in such a way as not to interfere with his neighbour's enjoyment of his land. Artificial drainage ways should be directed to existing natural watercourses when accessible. A landowner has a right to drain his lands into existing streams and rivers so long as the volume of water flowing in the stream is not thereby increased beyond its capacity; drainage beyond this limit, causing water in the natural watercourse to overflow, may subject him to liability to riparian owners injured by the overflow.⁴⁶ Along similar lines, a landowner may be liable for injuries occasioned where he drains his land through a ditch emptying into a marsh or swamp and causes the level of the water in the swamp to rise and flood adjoining lands.⁴⁷ Furthermore, he will be liable for injury caused through the overflow of water from ditches which are of insufficient capacity to carry off the surface water, or which he fails to maintain.⁴⁸

Since artificial diversion of surface water gives a cause of action to the owner of the land across which the water is diverted, failure on the part of that owner to take steps to prevent the diversion, either by private or legal means, for a period of longer duration than that limited by statute, may preclude him from complaining of the diversion; in this case a right to drain will be said to have been prescribed.⁴⁹

In summary, a public authority erecting structures on its own land, or on land of another under licence from the owner, for purposes of artificially channelling surface water into designated reservoirs, must carry on the project within the framework outlined above. First, it must not channel the water over adjacent lands so as to interfere with the use and enjoyment of these lands without permission; second, channels constructed on its own land or lands under licence must be constructed adequately so that the water will not interfere with adjoining lands; and third, the channels must be properly maintained.

Permissible Interferences with Natural Drainage

Perspective

As already mentioned, the key to the utilization of surface water for beneficial purposes lies in the accumulation of water in sufficient volume to be of economic

46. *Young v. Tucker* (1899), 26 O.A.R. 162; *McGuire v. Township of Brighton* (1912), 7 D.L.R. 314. See also Chapter Nine, at pp. 205-6.

47. *Messenger v. Miller* (1918), 52 N.S.R. 142.

48. *Rose v. Rural Municipality of Ochre River* (1910), 15 W.L.R. 200; *Kenny v. Rural Municipality of St. Clements* (1913), 15 D.L.R. 229; *Nicholson v. G.T.R.* (1914), 7 O.W.N. 480. The mere fact, however, that a landowner has taken upon himself the task of diverting surface water through an artificial ditch does not place upon him an absolute liability to ensure that the ditch is adequate to completely drain his land. Where the ditch properly diverts surface water off the land, without overflowing, but fails to effect the drainage of the whole of the property, so that natural drainage still flows onto adjoining lands, the owner is not liable for injury from natural drainage any more than he would have been had he not constructed a ditch on his land. The point is that his liability is limited to injury related *causally* to the improper construction of the ditch: see *Rister v. Haubrich*, [1958] S.C.R. 665; this case was decided with reference to s. 8 of The Water Rights Act, R.S.S., 1953, c. 48, but it is submitted that the principle would extend to common law liability.

49. *Frechette v. St. Hyacinthe Mfg. Co.* (1883), 9 A.C. 170; *Harrison v. Harrison* (1883), 16 N.S.R. 338; *Jennison v. Municipality of East Hants* (1885), 18 N.S.R. 71; *Ostrom v. Sills* (1897), 24 O.A.R. 526, at pp. 539-40; *Treguno v. Barton*, (1921) 20 O.W.N. 2. The prescribed right extends only to that amount of water drained during the relevant period. There may, in exceptional cases, be some basis as well for arguing that an easement of necessity has been acquired to drain across adjacent land where the land would be uninhabitable without such drainage. This was argued unsuccessfully in *Baker v. Griffin* (1923), 24 O.W.N. 34, 293.

value. Some of the legal problems involved in artificially draining surface water into storage reservoirs have already been considered from the perspective of the person seeking to accumulate the resource. Insofar as accumulation may be effected through the mere capture of natural drainage flows, the common law rules validating interferences with the natural flow of surface water prior to its actual capture in storage reservoirs must be considered. It is relevant to inquire into the extent to which private parties would, at common law, be free to interfere with a public authority seeking to collect surface water through the operation of natural forces.

Appropriation

The common law rule permitting the person in possession of land to appropriate surface water flowing across it stands as a major impediment to a program for the accumulation of natural drainage for redistribution.⁵⁰ The effect of the rule is that any person in the natural drainage line may pre-empt the exercise of a right of appropriation by an individual or authority seeking to capture and use the water, merely by preventing the water from ever reaching the lower land.

Obstruction of Flow by Artificial Means

An owner of land may prevent surface water from passing across his property by creating artificial obstructions, notwithstanding that this may flood higher land in the line of flow or may interfere with a program of accumulation undertaken by another owner further down.

In greater detail, the common law position is that lower land owes no servitude to higher land to receive the natural drainage from the higher land. Every landholder has the right to obstruct the flow of surface water to keep it off his land.⁵¹ In *Scott Rural Municipality v Edwards*⁵² Martin J. A. of the Saskatchewan Court of Appeal, in a judgment subsequently adopted by the Supreme Court of Canada, stated:

The doctrine of the common law is stated to be that the upper proprietor has no legal right, as an incident of his estate, to have surface water falling on his land discharged on the lower estate, although it naturally would find its way there, but that lower proprietor may lawfully, in the proper use of his land, erect obstructions to prevent the water from overrunning his land, even if such obstruction has the effect of forcing the water back on the lands of the upper proprietor.⁵³

Clearly this broad proposition covers any interference with surface water flowing in irregular and unrestricted fashion from property to property. Nor can it be contended that the owner of land may not interfere with a flow of surface water which has been unlawfully diverted onto his property by a higher landowner; unless a right to artificial drainage has been prescribed by the higher landowner, the lower landowner may stop up the drain.⁵⁴

50. The rule is discussed at pp. 378-9.

51. *Crewson v. G.T.R.* (1867), 27 U.C.Q.B. 68; *Darby v. Crowland* (1876), 38 U.C.Q.B. 338; *Nichol v. Canada Southern Ry. Co.* (1877), 40 U.C.Q.B. 583; *Williams v. Richards* (1893), 23 O.R. 651; *Wilton v. Murray* (1897), 12 Man. R. 35; *McBryan v. C.P.R.* (1898), 29 S.C.R. 359; *Graham v. Lister* (1908), 9 W.L.R. 589; *Re Sinclair v. Sharpe* (1924), 26 O.W.N. 134; *Meier v. Franklin*, [1927] 2 D.L.R. 294; *Scott Rural Municipality v. Edwards*, [1934] 3 D.L.R. 793 (Sup. Ct. Can.); *Shepherd v. Rural Municipality of Rockwood* (1958), 66 Man. R. 425; *Heisel v. Stein*, [1962] O.W.N. 51; *Tomchak v. Rural Municipality of Ste. Anne* (1962), 33 D.L.R. (2d) 481.

52. [1934] 3 D.L.R. 793 (Sup. Ct. Can.).

53. *Ibid.*, at pp. 793-4.

54. *McBryan v. C.P.R.* (1898), 29 S.C.R. 359; see also *Ostrom v. Sills* (1897), 24 O.A.R. 526.

It also appears that a lawful obstruction to a flow of surface water may be made at any point within the boundaries of the landholder's property. Although most of the cases in which the problem has been raised involve the building of obstructions at the point where the water enters upon the boundaries of the land, there are indications that a landholder will not incur liability merely because he chooses to place his barrier at a point some distance from his boundary.⁵⁵

A question that has presented some difficulty, however, is whether a person in possession of land may obstruct a flow of surface water which is confined in a natural channel such as a ravine or a natural depression in the surface of the soil. Considerable confusion has arisen from the fact that the civil law rule appears to differ from the rule generally accepted in common law courts. Under the civil law, lower land is subject to a servitude to receive drainage flowing in a natural channel from higher lands. Much of the confusion is precipitated by a discussion of the problem in an early American authority, *Farnham on Waters and Watercourses*. Farnham sets out the civil law rule as follows:

Domat states the rule of the civil law as follows: "If waters have their course regulated from one ground to another, whether it be the nature of the place, or by some regulation, or by a title, or by an ancient possession, the proprietors of the said grounds cannot innovate anything as to the ancient course of the water. Thus, he who has the upper grounds cannot change the course of the waters, either by turning it some other way, or rendering it more rapid, or making any other change in it to the prejudice of the owner of the lower grounds. Neither can he who has the lower estate do anything that may hinder his grounds from receiving the water which they ought to receive, and that in the manner which has been regulated." It will be seen that, by the rule as thus stated, in order to prevent interference by the lower owner, the waters must have "had their course regulated", which seems to imply that there has been something more than a mere general diffusion of water over the surface of the ground, merely finding its way without definite course from higher to lower property.⁵⁶

After discussing various common law authorities, Farnham concludes, probably erroneously, that the same rule has been adopted in England, and that the common law also precludes interference with drainage confined in a natural channel. This position has been adopted in the Alberta Supreme Court,⁵⁷ but the consensus seems to be that the civil law rule in fact differs from the common law rule. Part of the difficulty lies in the fact that the origins of the common law position are vague; the problem does not appear to have been one of any significance in England, probably owing to the early acceptance in that country of drainage administration boards.⁵⁸ There is some suggestion, as well, that the alleged discrepancy stems from a doctrine early developed in the Massachusetts courts.⁵⁹ Notwithstanding these difficulties, most Canadian courts seem to accept the position that all drainage may be obstructed unless classifiable as a water-course. For example, in *Ostrom v. Sills*, Moss J. A. said:

55. See *Renwick v. Vermillion Centre School District No. 1446 Trustees* (1910), 15 W.L.R. 244; also, *Gerrard v. Crowe*, [1921] 1 A.C. 395.

56. *Farnham on Waters and Watercourses* (Rochester, 1904), vol. 3, p. 2586.

57. *Makowecki v. Yachimyc* (1917), 34 D.L.R. 130; *Farnell v. Parks* (1918), 38 D.L.R. 17; *Oliver v. Francis* (1919), 14 Alta. L.R. 509.

58. See D. P. Derham, "Interference with Surface Waters by Lower Landholders" (1958), 74 L.Q.R. 361, at p. 371.

59. Namely, the common enemy doctrine, discussed at p. 390.

The doctrine of the civil law has not been adopted by the Courts of this Province. As regards mere surface water precipitated from the clouds in the form of rain or snow, it has been determined that no right of drainage exists *jure naturae*, and that as long as surface water is not found flowing in a defined channel with visible edges or banks approaching one another and confining the water therein, the lower proprietor owes no servitude to the upper to receive the natural drainage.⁶⁰

It is conceded that these words are replete with ambiguities. For example, the reference to surface water "found flowing in a defined channel with visible edges or banks . . . confining the water therein", might, in fact, be taken as support for the civil law position. However, it should be emphasized that the initial premise of Moss J. A. is that the civil law rule of servitude does not exist in Ontario; also, proper attention should be paid to the authorities which he cites in support of his general proposition, which raise the clear distinction between surface water and water flowing in a natural watercourse.⁶¹ Presumably Moss J. A. meant that unless the waters falling upon the land can be seen to be flowing in what can be designated a natural watercourse under the usual common law rules, the lower landowner may obstruct the flow. This was recently determined to be the law by the Ontario Court of Appeal in *Heisel v. Stein*, where Schroeder J. A. said:

The owner of land on which there is surface water which does not constitute a stream flowing in a definite channel, owes no obligation to the owner of higher land [to receive it].⁶²

A similar approach was taken in Saskatchewan in the judgment of Martin J. A. in *Scott R. M. v. Edward*:

I cannot but conclude that the weight of authority in the Provinces of Canada where the English common law prevails is that the principles which apply to water flowing in a defined channel do not apply to surface water—water of a temporary and casual character—which does not flow in any regular channel and has no certain course but which merely squanders itself over the surface of the ground.⁶³

Support for the right of obstruction can also be found in the Nova Scotia case of *Harrison v. Harrison*,⁶⁴ where Sir John Thompson said:

. . . it has been held that the proprietor of the lower territory may, notwithstanding the long continued, natural flow in undefined channels, and sometimes in defined, natural, channels, raise his lands or alter its levels, in such a manner as to turn the water aside . . .

Unfortunately, there is no elaboration of the critical phrase. "sometimes in defined channels", and one can only assume that this was meant to apply to surface water flowing in a natural channel, but one that lacks sufficient definitive status to be termed a "natural watercourse".

What should be emphasized, as well, is that this right of obstruction has been affirmed in a multitude of Canadian cases where the issue almost invariably has been whether the flow of water amounts to a watercourse or merely a flow of surface water.⁶⁵ The problem usually reduces itself to this: if it is a watercourse it is a riparian stream and cannot be obstructed; but if it is merely surface water,

60. (1897), 24 O.A.R. 526, at p. 539; aff'd (1898) 28 S.C.R. 485.

61. *McGillivray v. Millin* (1867), 27 U.C.Q.B. 62; *Crewson v. G.T.R.* (1867), 27 U.C.Q.B. 68; *Darby v. Crowland* (1876), 38 U.C.Q.B. 338; *Beer v. Stroud* (1888), 19 O.R. 10; *Williams v. Richards* (1893), 23 O.R. 651; *Arthur v. G.T.R.* (1895), 22 O.A.R. 89.

62. [1962] O.W.N. 51, at p. 52.

63. [1934] 3 D.L.R. 793, at p. 796.

64. (1883), 16 N.S.R. 338, at p. 343.

65. See cases at notes 51 and 61.

the flow may be obstructed. Were it not for the Alberta case of *Makowecki v. Yachimyc*,⁶⁶ the issue would be that simple. Unfortunately, this case has raised a third category—a surface water flow that does not carry riparian rights, but which may not be obstructed owing to the interposition of the civil law doctrine of servitude, a doctrine which ostensibly has been rejected by other courts. It seems necessary, therefore, to discuss this decision. Surface water collected in a natural depression on the plaintiff's land and flowed through the defendant's land a distance of about five and one-half miles to the Saskatchewan River. The flow had no well-defined banks and was dry during certain parts of the year. The defendant obstructed the flow by erecting a wall at the boundary of the two properties, forcing the water back onto the plaintiff's land. Beck J., giving the majority decision, held that it was not a watercourse, in the sense of a stream, but that it was merely a surface water flow which did not give riparian rights to the owners of land on its banks. He then made reference to the civil law rule of natural drainage, as outlined in *Farnham on Waters and Watercourses*, and quoted from that work to the effect that "under the civil law and the English common law, so far as we have any trace of it, the rule is that the natural drainways must be kept open to carry the water into the streams and that the lower estate is subject to a natural servitude for that purpose".⁶⁷ He pointed out, however, that the lower landowner has no correlative riparian right to receive the water. He made further extensive references to *Farnham*, then relied on the Ontario case of *Beer v. Stroud*,⁶⁸ where Boyd C. had said:

By the civil law it was considered that land on a lower level owed a natural servitude to that on a higher, in respect of receiving without claim to compensation, the water naturally flowing down to it . . . Such is, I think, also the common law when the rain—or surface—water has from the trend of the land formed itself into a defined channel . . .⁶⁹

It must be emphasized, however, that a few lines earlier Boyd C. had taken considerable effort to establish the flow in question as a watercourse:

For all practical definition, if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and defined channel, that constitutes a watercourse.⁷⁰

It is unclear whether Boyd C.'s primary point was that a servitude attaches in respect of a drainage flow in a natural channel, or that a drainage flow which forms a defined channel is entitled to the status of a watercourse, so as to be unobstructable under the traditional approach of the Ontario courts towards the doctrine of riparian rights. The question is whether his reference to the civil law doctrine of servitude is merely an analogy to the common law position adopted in the riparian doctrine, or whether he is laying down a common law doctrine of servitude with respect to natural drainage. If the latter is true, his earlier discussion as to whether the flow is a watercourse is totally unnecessary. It seems more reasonable to argue that the case was decided on the basis that the flow was in fact a watercourse and therefore could not be obstructed. This was the interpretation placed on the decision in the dissenting judgment of Stuart J. in the

66. (1917), 34 D.L.R. 130.

67. *Ibid.*, at p. 133.

68. (1888), 19 O.R. 10.

69. *Ibid.*, at pp. 18-19.

70. *Ibid.*, at p. 18.

Makowecki, case⁷¹ holding that there is a clear right to obstruct drainage except where it flows in a natural watercourse.

It is interesting to note, as well, that both Beck J. and Stuart J. in the *Makowecki* case supported their opposed arguments with the same passage from the judgment of Moss J. A. in *Ostrom v. Sills*, quoted above.⁷² This testifies to the ambiguity of language employed to resolve surface water problems. By a close three-two decision the law of Alberta was determined as supporting a doctrine of drainage servitude in respect of a flow which does not constitute a watercourse within the normal usage of the term. It is suggested that this does not represent the common law of the Atlantic Provinces, although some reservation must be made in rendering this opinion; the law is simply not clear. Contributing to this lack of clarity, unfortunately, is the confusion with which many judges have approached the exact civil law position, the vagueness of the source of the so-called "common law rule", and the lack of precision with which courts have employed terms of art in discussing these problems.

While this issue is of considerable importance in determining whether a person obstructing a flow of surface water will be liable to persons higher up the flow whose lands are flooded, it should be pointed out, in consolation, that the issue is not all that relevant to the development of a program of surface water accumulation. What was at stake was whether, at common law, a landholder in the line of drainage flow may interfere with the flow by obstructing it at his boundary. It is submitted that he may, whether the flow is unregulated or is confined within a natural depression, as long as the flow cannot be classified as a natural watercourse. But even if, as the *Makowecki* case suggests, a landowner may not obstruct drainage flowing in a natural depression, the right of action vests in the higher landholder who is seeking to have his lands drained by natural process. Nothing in the case suggests that a landholder farther down the line, who may have established a program for capturing and re-using the water, has any right to receive it so as to enable him to maintain an action for an interference with the flow. To the contrary, since the authorities are clear that a landholder may appropriate surface water at the expense of a lower landholder, *a fortiori* he may obstruct it, at least in the absence of a doctrine of reasonable user.

Obstruction of Flow by User of Land

The obstruction of a flow of surface water occasioned by topographical modifications or by the use and development of land is not actionable, notwithstanding that this may flood higher land in the line of flow or may interfere with a program of accumulation undertaken by an owner farther down the line of flow.

It was suggested⁷³ that a project for the accumulation and redistribution of surface water, which is reliant on natural drainage flows for supply, is subject to lawful interference by other landowners artificially obstructing the flow to prevent it crossing their lands. A similar position has been adopted where the interference with the flow of surface water is occasioned by a modification of the land in the course of land use and development. Numerous cases support this

71. *Makowecki v. Yachimyc* (1917), 34 D.L.R. 130, at pp. 143-4.

72. See text at note 60.

73. See above at pp. 382 *et seq.*

proposition. Where a landholder in *Steele and Embree v. Lofranco*⁷⁴ raised the surface of his land and filled in a depression so as to back up the flow of surface water on higher land owned by the plaintiff, his right to do so was affirmed. It has also been suggested that an interference with drainage caused by the normal cultivation of the soil is not actionable;⁷⁵ and several cases have affirmed the proposition that, in the absence of statutory variation, railway companies⁷⁶ and municipalities⁷⁷ may raise the level of roadbeds without incurring liability in respect of damage caused by water penned up on adjoining lands.

This common law position appears to be wholly unaffected by such considerations as whether the use of land is reasonable or the motivation proper.⁷⁸ Inasmuch as there is no obligation on the part of a landowner to receive drainage, he may obstruct the flow by any means or with any motive to prevent the water from coming into his land, without incurring liability to landholders higher up or farther down the line of flow.

Regard for the Rights of Third Parties

i. Perspective

Related to the obstruction of the flow of natural drainage is the question whether a person may prevent surface water from flowing across his land if the result is that the water flows across the land of a third party not otherwise affected by the flow. There are two aspects to the problem: first, where the water is in fact diverted through the erection of an artificial obstruction to stop the flow, and, second, where the water is diverted by an obstruction created in the course of the use and development of the land.

The resolution of this problem is primarily of importance where the objective is land resource, as contrasted with water resource, development. If a person undertakes construction on his land it is important to ascertain the limits of his liability in respect of damage caused by the modification of a surface water flow, either as a direct result of the construction, or as a result of the obstruction of the flow in order to render the land suitable for development. In this sense, the problem is at least remotely related to water resource development, to the extent that the use of land is necessarily incidental to such development. The problem may also be significant from the standpoint of ascertaining the rights of a person engaged in surface water collection and redistribution on his property. For example, a person may employ special treatment procedures for water accumulated in

74. [1955] O.W.N. 350; see also *Heisel v. Stein*, [1962] O.W.N. 51.

75. *McConachie v. Galbraith* (1903), 2 O.W.R. 1048; *Williams v. Richards* (1893), 23 O.R. 651.

76. *Crewson v. G.T.R.* (1867), 27 U.C.Q.B. 68; *Nichol v. Canada Southern Ry.* (1877), 40 U.C.Q.B. 583. But for application of Railway Act, see *Coyne, Railway Law of Canada* (Toronto, 1947), pp. 336-40.

77. *Darby v. Crowland* (1876), 38 U.C.Q.B. 338; *Harrison v. Harrison* (1883), 16 N.S.R. 338; *Bakersville v. Franklin* (1906), 3 W.L.R. 547; *Meier v. Franklin*, [1927] 2 D.L.R. 294; *Sigurdson v. Rural Municipality of Argyle* (1956), 63 Man. R. 517; *Shepherd v. Rural Municipality of Rockwood* (1958), 66 Man. R. 425; *Tomchak v. Rural Municipality of Ste. Anne* (1962), 33 D.L.R. (2d) 481; *Lee v. Rural Municipality of Arthur* (1965), 52 D.L.R. (2d) 263.

78. These matters, however, are of importance when considering the question of liability for diverting water, through land modification, onto the land of third parties who would not otherwise be affected by the flow; see pp. 394-8.

reservoirs on his property, and may wish to recover damages for injury to his specially treated water by lower quality water diverted from adjoining properties. While there is no question that he may maintain an action in respect of surface water which has been artificially diverted from adjoining lands onto his property,⁷⁹ it is by no means as clear that he has a right of action where the diversion is the mere consequence of an attempt, by an adjacent owner, to prevent surface water from entering his land, or merely to make use of his land.

ii. *Diversion by Protective Barriers*

Whether a landholder will be liable for injuries caused to adjacent lands, not otherwise in the line of flow, by surface water that is diverted as the consequence of an obstruction erected to prevent the flow from crossing his land is open to some question. Involved here is the interaction between two somewhat conflicting principles: on the one hand, that a man may obstruct the flow of surface water, and, on the other, that a man may not divert it onto his neighbour's land. A strong argument can be made that liability will not arise where the person obstructing the flow can establish that he has erected the barrier in good faith for the protection of his land so that it may be put to reasonable use, and that the barrier has been erected as a true means of obstruction and not as a medium for directly casting the water onto his neighbour's property.

In greater detail, the rule that a man is liable for diverting surface water onto the land of his neighbour appears to be modified where the diversion is merely a consequence of an act done in the course of protecting his land against damage from a flow of surface water. The law does not require a landholder to submit to the flow of surface water across his land, and his right to obstruct the flow is not necessarily removed by the fact that injury is thereby occasioned to adjoining lands. This proposition can only be stated with some equivocation, however, since there are differences of opinion in the various cases in which the matter has been considered.

Affirming the right, ostensibly, is *McBryan v. C.P.R.*,⁸⁰ where a landowner, Shaw, had brought creek water onto his land for irrigation. Some of the water overflowed from his land onto the plaintiff company's land, thence through a culvert onto the defendant's land. The defendant built a barrier at the edge of his property, forcing the water to back up and flood the plaintiff's land. The issue was whether the defendant could obstruct the flow at the expense of the plaintiff, who was in no way responsible for the flow of water, or whether he was obligated to obstruct the flow at the point where the water entered upon the plaintiff's land so as to preclude the flooding of the plaintiff's land. The Supreme Court of Canada held that the defendant was entitled to obstruct the flow, notwithstanding that the plaintiff's land became flooded, and that he was under no obligation to commit a trespass against the plaintiff by erecting a barrier on the plaintiff's land. Sedgewick J. said:

It is, I think, a universal principle that a man may do what he likes with his own, provided that in so doing he does not interfere with some legal right of his neighbour. In the present case, ... there was no natural watercourse, there was

79. See pp. 379-81.

80. (1898), 29 S.C.R. 359.

not even an artificial watercourse, and in so far as the defendant's lands were damaged it was a pure act of trespass on the part of Shaw from which the defendant had a clear right to protect himself by all lawful means irrespective of any consequences which might happen to other parties.⁸¹

What Sedgewick J. seems to be suggesting is that since the defendant owed no duty to the plaintiff to submit to the flow, and had a right to obstruct it in order to protect himself, the plaintiff could not complain of the consequences.

Unfortunately, there are several features of the case that tend to obscure the true principle. First, the plaintiff was, in fact, in the direct line of flow. Except for the fact that the flow did not originate by natural means, there is nothing to distinguish the *McBryan* situation from the ordinary case of a lower landowner obstructing the flow of water from higher lands in the direct line of flow.⁸² Second, and related to the first consideration, there is much to suggest that the court took the view that the plaintiff could have avoided the whole situation by blocking the flow before it crossed its land. Sedgewick J. rationalized his judgment to some extent on this basis,⁸³ and Gwynne J. went so far as to suggest that the plaintiff could not be deemed an "innocent party".⁸⁴ Third, the repulsion was of an act of trespass, not of a natural flow of surface water; there may be some argument that a landholder may have greater latitude in repelling water forced upon him by someone else than in repelling water which flows onto his land as a natural incident of the property itself.

On the other hand, the judgment of Sedgewick J. does contain sweeping generalizations which would tend to support a broad right to protect one's land under all circumstances, regardless of injury to one's neighbours.⁸⁵ Reference is made to *Goddard on Easements*, which states that:

The case of flood water is different from that of flowing streams, and the principles of law relating to the latter do not relate to floods; but it may be mentioned in passing that every landowner has a right at common law to protect his land from damage from floods, and for that purpose to erect dams or other defences to divert the flood-water from its natural course.⁸⁶

And in a footnote to this reference it is stated:

From these decisions it does not appear clear whether the landowner who defends himself against floods, incurs liability to another person, if by his act the flood-water is thrown upon the other's land and does injury there. In *Trafford v. Rex*, Tindal C. J. said the exercise of the right was subject to the restriction that the person exercising it did not thereby occasion injury to the lands or property of other persons; but in the case of *Nield v. The London & North Western Railway Co.*, it was held that as the water was not brought into the canal by the defendants they were not liable for damage caused to a neighbour owing to their

81. *Ibid.*, at pp. 367-8.

82. As discussed at pp. 382 *et seq.*

83. (1898), 29 S.C.R. 359, at p. 368.

84. *Ibid.*, at p. 365.

85. *Ibid.*, at pp. 368-9; see also at pp. 369-70 where he says: "In all these cases, instead of putting up protective works on my own estate I might with equal inconvenience to myself and equal benefit as well, have put them up on or beyond the limits of my neighbour's land. Does the obligation of neighbourhood impose that duty upon me? And if so, and I fulfill it, will not my neighbour's neighbour have a similar claim for the damage I have done him? And how far afield must I go? These illustrations contain their own refutation, otherwise it might be an actionable wrong to plant a hedge or erect a party wall or fence, or even build one's house upon a water-proof foundation. They are common enemies, the wolf, the fire, the wind, the flood, and every one must of necessity have a right to defend himself within his own domain against them."

86. *Ibid.*, at p. 370.

act of defence. The latter principle appears the more reasonable of the two, for the natural result of preventing water coming on one man's land is to force it to flow on to the land of another, where it is sure to be more or less prejudicial. How then can it be said that there is a right to defend one's own land by forcing the water on to another person's ground, and yet that it is wrong to cause the injury which must necessarily follow?⁸⁷

While this right of self-protection undoubtedly exists as to flooding rivers, the question arises whether it applies as well to mere surface water flows. Two of the leading English cases which have affirmed the principle have dealt with the matter of protecting land from water spilling over from rivers. In *Nield v. The London and North Western Railway Company*,⁸⁸ the defendants placed a barrier across the opening of their canal to protect it from the rising waters of the adjacent river. In *Gerrard v. Crowe*,⁸⁹ the defendants erected an embankment within their property boundaries to protect themselves from the perennial flooding of a river. An indication, however, that the principle is thought to apply to flooding from mere surface water comes from the fact that the court in *Gerrard v. Crowe* was faced with the task of distinguishing two cases which involved mere surface water flows.⁹⁰ The cases were distinguished not on the ground that surface water was involved, but on quite different grounds.⁹¹ It is possible then that the principle may be broad enough to encompass flooding from surface water.

It has elsewhere been suggested that the right of self-protection can only be invoked in respect of a threat that constitutes a "common enemy", and that a "common enemy" is not in existence where the plaintiff is injured solely by the act of the defendant in protecting his land.⁹² The argument is that where both landholders are threatened by flood waters, each may do what he can to protect his land, without regard to the other; but where only one is threatened, he cannot transfer the burden of his position to the other. Probably this is too narrow an interpretation of the "common enemy" doctrine; the doctrine is, in fact, premised on the assumption that surface water, like wind, fire and other noxious things, is a danger against which landowners are given the right to defend their lands if, in so doing, the danger is transferred to a neighbour, who then must do what he can to protect himself. As is stated in *Corpus Juris Secundum*:

Some jurisdictions have adopted the common-law or common-enemy rule under which surface water is regarded as a common enemy which every proprietor may fight as he deems best, regardless of its effect on other proprietors⁹³

What do seem to be prerequisites to a right of obstruction in the face of injury to innocent third parties are that the obstruction be made *bona fide* for the purpose of protecting the land so that it may be put to reasonable use, and that the barrier not be erected as a direct means of diverting water onto adjoining lands. This seems to be borne out by the leading case of *Ostrom v. Sills*.⁹⁴ Here

87. *Ibid.*, at pp. 370-1, citing *Trafford v. Rex* (1832), 8 Bing. 204; 131 E.R. 379, and *Nield v. London and North Western Railway Co.* (1874), 10 Ex. 4.

88. *Ibid.*

89. [1921] 1 A.C. 395.

90. *Hurdman v. The North Eastern Ry Co.* (1878), 3 C.P.D. 168; *Whalley v. Lancashire and Yorkshire Ry. Co.* (1884), 13 Q.B.D. 131.

91. *Gerrard v. Crowe*, [1921] 1 A.C. 395, at p. 400.

92. *Woolner v. Dyck*, [1950] 4 D.L.R. 745, at pp. 748-9, *per* Laidlaw J.A.

93. 93 C.J.S., p. 806; see also *McBryan v. C.P.R.* (1898), 29 S.C.R. 359, at pp. 369-70 as reproduced in note 85.

94. (1897), 24 O.A.R. 526; *aff'd* (1898), 28 S.C.R. 485.

a municipality drained surface water through a culvert onto the defendant's property. The defendant erected a building near the boundary of his property and, in order to protect his building, constructed a barrier to deflect the water into an alley between the defendant's building and the plaintiff's building. After a short time, debris accumulated in front of the barrier eventually blocking the culvert. The water backed up and found its way onto the plaintiff's property. The Ontario Court of Appeal held that the plaintiff had no cause of action. Moss J. A. said:

I think that the defendants are entitled to judgment, because in doing what is complained of they are protecting themselves against the acts of other parties by means of something put up on their own land as a barrier, and not as a medium for conducting the waters from their premises to, and casting them upon, the plaintiff's premises; and because the defendants are making a reasonable and natural user of their own premises in building upon their lands, and in doing so they are not exceeding their proprietary rights; and because, if the plaintiff is suffering damage, it is by reason of the attempt of the municipality, and others not parties to this action, to dispose of their surface waters and drainage by unwarrantably casting them on the defendants, thereby seeking to impose a burden upon them, which they are properly resisting.⁹⁵

Again, in *Ostrom v. Sills*, as in the *McBryan* case, the obstruction was erected by the landowner to protect his land from water cast upon it by artificial means. The case, however, affirms that a landholder owes no servitude to receive mere surface water, and, presumably, the same result would have obtained if the obstruction had been of a natural flow of surface water. *Ostrom v. Sills* is stronger than the *McBryan* case, however, inasmuch as the case is one involving injury to an innocent third party; contrary to what has been said in some succeeding cases,⁹⁶ it appears that *Ostrom v. Sills* is not simply a case involving the right to obstruct water and force it back on a higher proprietor in the line of flow. It is clear that, but for the obstruction, no water would have reached the plaintiff's property, and this was the factual basis upon which the case was decided.⁹⁷

The right to obstruct surface water flowing onto one's property, even where adjoining lands bear the brunt of the injury, has been affirmed as well in *dicta* in various other decisions. For instance, in the Manitoba case of *Jukes v. Rural Municipality of Coldwell*, Mathers C. J. said:

Now let us see what the law was which the Legislature by this Act intended to alter. At the time it was passed the law of this Province with respect to surface water and also with respect to water flowing in a natural watercourse had long been definitely settled. A landowner had a right to erect on his own property any obstacles necessary to keep off surface water. If as a consequence the water was diverted to the property of his neighbour he was not liable.⁹⁸

Again, in *Graham v. Lister*, Morrison J. said:

It appears that a person upon whose land there is a sudden accumulation of water, brought there without any fault or act of his, cannot actively turn it off on to the premises of his neighbour in order to save his own property from injury But

95. (1897), 24 O.A.R. 526, at p. 542.

96. For instance *Woolner v. Dyck*, [1950] O.R. 190.

97. Note the opening words of Moss J.A. in *Ostrom v. Sills* (1897), 24 O.A.R. 526, at pp. 534-5: "The plaintiff's contention appears to be based on the propositions that he has an absolute legal right to require the defendants to submit to the flow from the culvert of the water coming through it from the surrounding lands, as in the case of a natural watercourse, or that a prescriptive right to require the defendants to permit the continuance of the flow of such water over their lands has been acquired against the defendants, of which the plaintiff can avail himself, or that the defendants have no right to block the flow of the water through the culvert in such manner as to cast it or some of it on the plaintiff's premises to his damage." (Emphasis added).

98. [1927] 1 D.L.R. 82, at p. 87.

that is not this case, where there was an intermittent danger of overflow, and to guard against its recurrence the defendant takes the precaution of protecting her own property. The water had not got on to her land. It is not a case of letting water off her land on to that of the plaintiff.

That circumstance, I think, brings this case within the scope of *Nield v. London and North Western R. W. Co.*, ... and *Rex v. Pagham Commissioners*, ... where it was held that upon a danger threatening you, and only for the purpose of protecting yourself, you prevent the danger from happening to you, but the danger is so far common that the necessary consequence of its being prevented from happening to you is that it will happen to your neighbour, in so acting there is no intention of injuring your neighbour, and you are not answerable because the danger which has been diverted from you has done mischief to some one else ...⁹⁹

And recently in the Ontario Court of Appeal, Schroeder J.A. said in *Heisel v. Stein*:

The owner of land on which there is surface water which does not constitute a stream flowing in a definite channel, owes no obligation to the owner of higher land and unless the adjoining owner has acquired a prescriptive right he has no right to have it flow upon the lower land. The proprietor of that land is entitled to take measures to exclude the flow of such surface water onto his land from the higher level, and no action lies against him for damage suffered by a third party in consequence of an obstruction erected with a view to such exclusion.¹⁰⁰

The leading authority in support of the conflicting viewpoint is *Woolner v. Dyck*.¹⁰¹ This case has been cited for the proposition that a landholder may not obstruct the flow of surface water where the effect is to inflict injury on innocent third parties.¹⁰² Here the defendant erected a dyke on the edge of his property to protect buildings erected on his land. The dyke diverted the flow of surface water onto adjacent lots, also owned by him; he then raised the surface of those lots so as to cause the accumulated water to flow onto the plaintiff's land. The trial judge, Urquhart J., raised the question whether a landholder may lawfully protect his property by diverting the water onto adjoining property, even where he is endeavouring in good faith to protect his property rather than injure his neighbours. He decided that he could not:

Considering all these cases, I am of opinion that, while the case of *McBryan v. The Canadian Pacific Railway Company* ... and particularly at least one of the illustrations given by Sedgewick J., comes pretty close to the present case, the cases which go so far as to say a man on his own land may erect dykes and embankments so as to prevent the flow of surface water on to his property, and has the right to do it regardless of the consequences to others, must be accepted with a limitation, and that limitation is that while a defendant may, in the *bona fide* protection of his property, erect dykes which turn the water back towards the higher lands from which it came, if the effect of these dykes and other embankments is to turn the water into an entirely new channel on its seeking an outlet, to the injury of the person whose land has not hitherto borne the burden of the flow of surface water, the party so doing is liable if the person onto whose land the water is turned suffers damage therefrom.¹⁰³

99. (1908-9), 9 W.L.R. 589, at pp. 591-2.

100. [1962] O.W.N. 51, at p. 52 (emphasis added).

101. [1950] O.R. 190; aff'd [1950] 4 D.L.R. 745.

102. See, for example, 22 C.E.D. (Ont. 2nd), p. 68: "The cases that go so far as to say that a man might erect dykes and embankments on his own land so as to prevent the flow of surface water on to his own property regardless of the consequences to others, must be accepted with the limitation that if the effect of the works is not to turn the water back onto the higher land from which it came, but to turn it into an entirely new channel, there will be liability if the person to whose lands it is turned suffers damage." Citing *Woolner v. Dyck*, [1950] O.R. 190.

103. [1950] O.R. 190, at p. 203.

In the course of his judgment, Urquhart J. quickly dismissed both *Ostrom v. Sills* and *McBryan v. C.P.R.* as raising the question of rights and liabilities only as between higher and lower landholders in the line of flow.¹⁰⁴ He cited as authority for his general proposition the cases of *La Force v. C.N.R.*¹⁰⁵ and *Niles v. G.T.R.*¹⁰⁶ The latter case is of dubious authority because of the vagueness of the reported facts. It was cited as authority in the *La Force* case, however, and attention will now be turned to that decision. There the defendant railway company raised the grade of its roadbed. Prior to this the natural flow of surface water had been northerly across its property. The defendant also built a board fence along the northern boundary of its land. The fence prevented the water from escaping across the defendant's land and actually diverted water which had accumulated upon the defendant's property onto the plaintiff's land. Mulock C.J.O. held the defendant liable.¹⁰⁷ What should be stressed is that liability was imposed for dealing with the land in such a way as to accumulate water on it, then diverting or casting it upon adjacent land. In this light, the case merely illustrates the basic diversion principle, and ought not to be cited as authority for a general proposition that a landholder is liable for obstructing surface water where it subsequently finds its way onto the property of an innocent third party. A number of cases similar to the *La Force* case have been decided; for the most part they involve municipalities building highways, or ditches to drain highways, in such a way as to cause surface water to be carried onto properties adjacent to the highway, either because the ditches have been improperly constructed and are unable to carry the volume of water brought into them,¹⁰⁸ or because insufficient outlets have been provided.¹⁰⁹ These cases only appear to affirm the principle that a person who alters his land in such a way as to allow water to accumulate within its boundaries must take all reasonable steps to avoid injury to neighbouring property.¹¹⁰ There is nothing to suggest that this duty arises, however, until the surface water is actually on the land. If the landholder's act is merely to obstruct the water before it can accumulate on his land, it would appear that he need only establish, first, that his act was done not with a view to diverting the water onto adjoining land but for protection only, second, that the water naturally found its way onto the adjoining land after being obstructed from crossing his land, and third, that it was on balance reasonable that he obstruct the water to make use of his land.

It is difficult to support the trial court's decision in *Woolner v. Dyck* on the basis of the authorities cited. The facts of the case do give rise to the possibility of imposing liability on the defendant without applying the broad proposition advanced by Urquhart J. There was sufficient evidence to establish that the nature of the defendant's action was a diversion of surface water onto the plaintiff's land, and that he did more than merely create a protective obstruction; what the defendant did was raise the level of a segment of his property after diverting

104. See text at note 96.

105. (1926), 30 O.W.N. 373; rev'd on facts: (1927), 32 O.W.N. 232.

106. (1913), 4 O.W.N. 820.

107. (1927), 32 O.W.N. 232.

108. *Foster v. Lansdowne* (1899), 12 Man. R. 416; *Kenny v. Rural Municipality of St. Clements* (1913), 15 D.L.R. 229; *Stott v. North Norfolk* (1914), 16 D.L.R. 48.

109. *Pelletier v. Springfield*, [1924] 4 D.L.R. 1158; *Jukes v. Coldwell*, [1927] 1 D.L.R. 82.

110. See, generally, pp. 394-8.

water onto it thereby forcing the accumulated water onto the adjoining property of the plaintiff. This was clearly an actionable diversion. This is apparent in the approach taken by Laidlaw J.A. on appeal. He said:

This is not a case in which the defendant has merely kept water from coming on to his lands by an obstruction forcing it back on to the lands of an upper proprietor from whence it came. Nor is it a case of a defendant taking means to protect himself from a danger common to him and the plaintiff. There is no danger to the plaintiff from surface water until the defendant caused it by works done by him on his own land. It is a case of a landowner putting buildings, dikes and embankments on his lands and thereby causing surface water to collect there and then to flow on to his neighbour's lands in a manner in which it would not go but for such works. In such a case, the one who has collected the water and caused it to flow on to his neighbour's land is liable for damages resulting therefrom.¹¹¹

While the judgment of Urquhart J. in *Woolner v. Dyck* may well represent the most exhaustive judicial examination of the issue under discussion in this section, and the most clearly articulated statement of principle, it must be approached with reservation in view of its analysis of existing authority, and in view of the fact that the case is easier to support on more traditional grounds. In short, the broad proposition advanced was not really necessary for deciding the case, as is apparent from the appellate decision.

iii. *Diversion as a Consequence of Land Use*

A landowner will not be liable for the obstruction of or diversion of surface water occasioned by the reasonable development of his land even though injury is thereby inflicted on the land of an innocent third party.

The first problem arising under this head is whether a landholder is entitled to raise the level of his land to render it better fit for use and development, where the consequence of doing so is to obstruct the flow of surface water before it reaches his land and to divert it across adjacent property not formerly in the line of flow. To a great extent the solution to this problem rests in the considerations raised in dealing with obstruction by protective barriers.¹¹² It is submitted that if the use of land is reasonable, and is done with a view to preventing surface water from reaching the property, and is done in such a way as to avoid unduly casting the water upon adjacent property, it is not actionable. This would appear to be borne out by the authorities discussed earlier, and also by the Ontario Court of Appeal in *Dean v. Board of Park Management of Sudbury*.¹¹³ There the defendant corporation, in the course of converting a gravel pit into an athletic park, raised the level of the surface, constructed sewers and raised the grade of an adjoining street without incurring liability for a consequential diversion of surface water onto the plaintiff's lands. Unfortunately, there is little discussion of law in the report of the case.

Of greater difficulty is the question whether liability attaches to a landholder who, in altering his land or in constructing upon it, changes the natural drainage pattern of surface water collecting on his land. In a strict sense this amounts to a diversion of water from one's own land onto the land of a neighbour. Whether it is actionable depends on an assessment of the nature of the defendant's use of

111. [1950] 4 D.L.R. 745, at pp. 748-9.

112. See pp. 388-94.

113. [1939] 1 D.L.R. 785.

his land. Generally speaking, if it represents a reasonable use of the land, and is carried out with normal skill so as not unduly to permit water to accumulate and overflow onto neighbouring property, no liability will attach in respect of a modification of the natural drainage characteristics of the land. The governing principle is one of nuisance law and is set out in *Halsbury* as follows:

Owners or occupiers of land are legally entitled to use or occupy their land for any purpose for which it may in the ordinary and natural course of the enjoyment of land be used or occupied, and they are not responsible for damage sustained by the property of others through natural agencies operating as a consequence of such ordinary and natural user or occupation.¹¹⁴

Several Canadian decisions appear to support the proposition that where drainage is affected by a natural user of land, no liability attaches. In the Nova Scotia case of *Harrison v. Harrison*,¹¹⁵ the defendant, a surveyor of highways, filled a ditch along a section of highway in order to facilitate public passage. As a result surface water flowed off the road onto the plaintiff's property. In upholding the legality of the defendant's act, Thompson J. said:

We have seen that in the case of an ordinary proprietor the right to have the surface water drain off to the property below is a natural incident of his property, and that he can alter the surface of his land, or its drainage facilities (presuming of course that he acts in good faith), without being liable to the proprietor below, who, in his turn, has, as a natural incident to his property, the right to turn such drainage aside by embankments or alterations in the levels of his land.¹¹⁶

In *Dean v. Board of Park Management of Sudbury*, referred to above, two members of the Ontario Court of Appeal affirmed the principle that:

A landowner is entitled to alter the surface and grades of his lands and to level and otherwise improve them without incurring any liability for the surface water which in the course of nature falls upon and drains from them.¹¹⁷

In *Rowe v. Rochester*,¹¹⁸ where a municipality was held liable for draining its road into defective ditches which caused the flooding of adjoining land, Wilson J. said:

In this case the defendants would be at perfect liberty to turnpike their road, and any water falling from the road by reason of the new shape given to it, on the plaintiff's land, they would not be answerable for; he would have to guard against it by embankment or otherwise.¹¹⁹

It has been suggested, further, that the modification of natural drainage occasioned by the normal cultivation of land is not actionable.¹²⁰

In other cases, however, changes in land resulting in the deflection of surface water on adjoining property have been held to ground a cause of action. A leading case is *Hurdman v. The North Eastern Railway Company*,¹²¹ where the defendant placed upon its land, and against a wall adjoining the plaintiff's building, large quantities of soil, clay, limestone and other materials. The effect of this was to raise the level of the surface of this section of the defendant's land above the

114. *Halsbury's Laws of England* (London, 1959) 3rd. ed., vol. 28, para. 169, p. 133.

115. (1883), 16 N.S.R. 338.

116. *Ibid.*, at pp. 355-6.

117. [1939] 1 D.L.R. 785.

118. (1870), 29 U.C.Q.B. 590.

119. *Ibid.*, at p. 597.

120. *McConachie v. Galbraith* (1903), 2 O.W.R. 1048.

121. (1878), 3 C.P.D. 168.

level of the plaintiff's property. Rainwater, deflected by this mound, oozed through the wall and into the plaintiff's building. Cotton L.J. in the English Court of Appeal held the defendant liable, saying:

Every occupier of land is entitled to the reasonable enjoyment thereof. This is a natural right of property, and it is well established that an occupier of land may protect himself by action against anyone who allows any filth or any other noxious thing produced by him on his own land to interfere with this enjoyment. We are further of opinion that, subject to a qualification to be hereafter mentioned, if any one by artificial erection on his own land causes water, even though arising from natural rain-fall only, to pass into his neighbour's land, and thus substantially to interfere with this enjoyment, he will be liable to an action at the suit of him who is so injured....¹²²

These words ought not to be interpreted to impose, necessarily, liability upon a landholder for damage resulting from water draining from land upon which changes have been made. From a policy standpoint such a result could foster an unwarranted retardation in land use and development. Cotton L.J. himself tempered these words by reference to the principle of nuisance law cited above. He stated:

...the owner of land holds his right to the enjoyment thereof, subject to such annoyance as is the consequence of what is called the natural user by his neighbour of his land, and...when an interference with this enjoyment by something in the nature of nuisance...is the cause of complaint, no action can be maintained if this is the result of the natural user by a neighbour of his land.¹²³

The *Hurdman* case, accordingly, is wholly consistent with the proposition that where a person effects changes in his property in the course of the natural user of land that are done with skill and in the usual manner, the owner is not liable for a diversion of the natural flow of surface water brought about by these changes. Cotton L.J. illustrates this by reference to the situation of a mine owner who, in working his minerals, allows water to gravitate onto adjoining land;¹²⁴ if his work is carried on with skill and in the usual manner, no liability attaches; excavating and raising minerals is a natural use of mineral land.

It appears that a landholder will rarely be absolved from liability where alteration of the land results in the accumulation of water which subsequently spills onto adjoining property, or results in the direct deflection of water onto adjoining lands. In these situations the common law seems to have placed a duty upon the landholder to take reasonable steps to obviate such injuries. A use of land is not natural or usual where steps are not taken to abate an unreasonable risk of injury to neighbouring lands. The *Hurdman* case may probably be explained by saying that it is not a natural use of land to erect a device ostensibly for the purpose of deflecting rainfall onto one's neighbour's property.

122. *Ibid.*, at p. 173.

123. *Ibid.*, at p. 174.

124. *Ibid.* See also *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330, at p. 338, *per* Lord Cairns: "My Lords, the principles on which this case must be determined appear to me to be extremely simple. The Defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the Plaintiff, the Plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing, some barrier between his close and the close of the Defendants in order to have prevented that operation of the laws of nature."

This would also seem to explain the Ontario case of *Berry v. Trinidad Leaseholds (Canada) Limited*.¹²⁵ There the defendant built a service station on his lot, and, in paving the surface, neglected to install catch basins. As a result water from rain and melting snow was not absorbed by the soil as it had been in the past; it accumulated within the contours of the paved surface in such volume that it flowed onto the plaintiff's adjoining property. In affirming the liability of the defendant, Aylesworth J.A. referred to the *Hurdman* case, and based his holding on the proposition put forth by the Ontario Court of Appeal in *Woolner v. Dyck*,¹²⁶ that a landholder must not collect surface water on his land and artificially channel it or allow it to be cast onto the land of another. It does not seem that liability was imposed simply because the defendant had placed an artificial surface on his property changing its natural drainage pattern; rather, it was imposed because he failed to take reasonable steps to prevent the obvious result which occurred. While it may be a natural use of land to build a service station on it, it is not a natural use of land to build in such a fashion that injury will be caused to neighbouring lands, especially where the injury could have been prevented quite easily. Aylesworth J.A. said:

...in this Province an occupant of land who, by artificial means, prevents the natural absorption in that land or alters the natural drainage therefrom of water caused by melting ice or snow or of rain-water naturally falling there is bound to take all reasonable means of preventing that water from collecting on the artificial surface he has created and draining from that surface on to his neighbour's land to the injury of his neighbour.¹²⁷

In the *Berry* case, Aylesworth J.A. approved of the analogous case of *Meredith v. Peer*,¹²⁸ where a landowner was held liable for an injury suffered by a pedestrian who was struck by ice which had accumulated upon and fallen from the defendant's roof. In that case Meredith C.J.O. had said:

After giving the question for decision my best consideration, my conclusion is that the owner or occupant of a building, the roof of which is so constructed that from natural causes the snow or ice which falls or collects upon it will naturally and probably slide from the roof, is bound, apart from any obligation imposed upon him by a municipal by-law, to take all reasonable means to prevent the snow or ice from falling upon the adjoining property or an adjoining highway and causing damage to person or property there, and that that is the extent of the obligation which the law imposes upon him.¹²⁹

A further analogy can probably be seen in the eaves-drip cases. In *Huckell v. Pommerville*,¹³⁰ the defendant erected buildings on his property close to the property line. Rainwater dripped off his buildings onto the plaintiff's verandah and against his home. The defendant was restrained from permitting the water to be cast off his building in this fashion. The obvious implication is that a person

125. [1953] O.W.N. 623.

126. [1950] 4 D.L.R. 745.

127. [1953] O.W.N. 623, at p. 625.

128. (1917), 35 D.L.R. 592.

129. *Ibid.*, at p. 600.

130. (1912), 1 D.L.R. 921; see also *Roberts v. Mitchell* (1894), 21 O.A.R. 433, at p. 439; *McDonald v. Lester* (1890), 30 N.B.R. 137, where the defendant was held liable for injury occasioned by water flowing from a negligently placed drainage spout which emptied against the plaintiff's house. But see *Mockford v. Leslie* (1926), 30 O.W.N. 289, where Mowat J., at p. 289, suggested that there is no liability for damage caused by water dripping from a roof unless negligence in the construction of an eavestrough or drain be shown: "If he had not put on an eavestrough there would have been no cause of action, as each owner must protect himself from surface-water and the rain from heaven."

erecting a building is required to take the reasonable step of constructing an eavestrough where the failure to do so would result in rainwater being deflected onto adjoining property. If, however, the building were situated in the middle of the lot, no one would suggest that an owner would be liable in respect of water which in normal fashion had dripped off the building and had eventually found its way onto adjoining property through natural forces; this would be merely a modification of the natural drainage pattern occasioned by the normal use of land.

It is apparent that a flexible approach must be taken to these problems. All the circumstances of the situation must be looked at closely to ensure that a reasonable and just result is reached. It is common sense and experience which will necessarily govern the application of the principles outlined above, reference being had to the usual practices of reasonable men in similar circumstances. One area of land development in which it is perhaps possible to predict liability is that of land reclamation. In the absence of statutory immunity attaching to a land reclamation project, acts which involve either direct drainage onto adjoining lands, or the displacement of water through the raising of the surface of the land, so as to effect a general rise in the water level on adjoining lands, will probably entail liability for injuries inflicted on adjacent lands. While land reclamation may be a perfectly natural undertaking, it is incumbent on a person seeking to reclaim land to make adequate provision for the drainage of the accumulated surface water so as to avoid injury to adjacent land.

SURFACE WATER STORAGE

Liability for the Escape of Water Stored on Land

Perspective

The accumulation and storage of surface water on land places a high degree of responsibility on the landholder to see that the water does not escape and cause injury to adjoining property. Accordingly, in establishing a project for surface water utilization, adequate storage facilities must be constructed and maintained.

Nuisance

Where the gradual escape of water constitutes a substantial and continuing¹³¹ encroachment on an adjoining landowner's right to use and enjoy his land, an action in nuisance may be brought by that owner to have the interference curtailed by injunction, as well as to recover damages for any injury occasioned by the escape. In *Portage la Prairie v. B.C. Pea Growers Ltd.*,¹³² a municipality was held liable in nuisance for the gradual escape of effluent from a sewage lagoon onto adjoining lands. The same principle would apply to an escape of pure water that created a substantial interference with the use and enjoyment of property or caused property damage, so long as the plaintiff had not consented to the creation of the nuisance.¹³³

131. It is not here suggested that a nuisance, to be actionable, must be of a "continuing" nature (see *Midwood v. Manchester*, [1905] 2 K.B. 597, at pp. 605 and 609, and *Dollman v. Hillman*, [1941] 1 All E.R. 355) but that nuisance would probably be the more likely action for an encroachment of this description.

132. (1966), 54 W.W.R. 477. See, also, *Paramuschuk v. Town of Meadow Lake* (1964), 47 D.L.R. (2d) 427; *Roberts v. City of Portage la Prairie* (1968), 2 D.L.R. (3d) 373; aff'd (1969), 6 D.L.R. (3d) 96.

133. See *McCallum v. Corp. of District of Kent*, [1943] 3 W.W.R. 489.

Negligence

Where the escape of water is caused by the negligent behaviour of the landholder storing the water, or his servants, an action in negligence may be brought to recover for any injury occasioned to adjoining lands.

Absolute Liability

In certain cases injury is caused by a sudden, unexplained escape of water. Often the facts are insufficient to establish that the storage reservoir constitutes a legal nuisance. At the same time, it may be impossible to substantiate an allegation of negligence against the landholder or his servants. The courts have responded to a demand for relief by imposing an absolute liability upon the person who chooses to conduct such an activity on his land to indemnify persons injured by the escape of a damaging substance. This principle was articulated in the English case of *Rylands v. Fletcher*.¹³⁴ There, the defendant operated a mill, and, in order to supply water for it, constructed a reservoir on his land. On the site upon which he chose to build his reservoir was an abandoned mine shaft, filled in and concealed. The water in the reservoir escaped through the mine shaft onto the plaintiff's property, causing injury. Owing to the circumstances the court held that recovery was not open on the basis of trespass, nuisance or negligence. Yet the plaintiff recovered. The reasons were set out by Blackburn J.:

The question of law therefore arises, what is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape [*sic*] out of his land. It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbours, but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions, in order to keep it in, but no more.

. . . .

We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God . . .¹³⁵

On the appeal to the House of Lords,¹³⁶ Lord Cairns restated the rule in such a way as to give a slightly different meaning to it. Liability for the escape depends not on the nature of the substance but, rather, on the nature of the use to which the land is being put; the use must be non-natural or abnormal. Lord Cairns' rule was subsequently adopted in *Rickards v. Lothian* where Lord Moulton said:

It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.¹³⁷

134. (1866), 1 Ex. 265, *sub nom Fletcher v. Rylands*.

135. *Ibid.*, at pp. 279-80.

136. (1868), L.R. 3 H.L. 330.

137. [1913] A.C. 263, at p. 280.

This variation in principle was commented upon by MacDonald J. in *The J. P. Porter Co. Ltd. v. Bell*, where he said:

The true situation seems to be that there is not one rule in *Rylands v. Fletcher* but two; and that Lord Blackburn's version or Lord Cairns' more flexible one is invoked according to the circumstances of the case in hand.¹³⁸

It would appear, however, that one of the major prerequisites for the application of the rule is this element of non-natural user. Support for this view is found in the following extract from *Salmond on Torts*:

...we are driven to the conclusion that the principle applies to anything which anyone brings, collects and keeps upon his land, otherwise than in the course of the ordinary user of the land, which in the circumstances of the case is likely to cause an undue risk of mischief to others. In some cases a confusion has crept in by which the distinction between dangerous and non-dangerous things has been confounded with the distinction between non-natural and natural user of land. It is submitted that the two questions, though related, are distinct. Water, filth, and many other so-called *Rylands v. Fletcher* objects are perfectly usual objects. In order that liability under the rule may be imposed it is necessary both that the user of the land should be extraordinary and that the object should in the circumstances of the particular case be dangerous.¹³⁹

The question, accordingly, is this: when is the storing of water on land a non-natural and dangerous user within the meaning of the rule? It has been held to be a natural user of land to bring water into a house for domestic uses,¹⁴⁰ and into a commercial building for normal purposes.¹⁴¹ On the other hand, it has been held to be a non-natural user to bring water into property under pressure¹⁴² or to store water in bulk.¹⁴³ The rule has also been applied to artificial drainage flowing across land with the owner's permission, and ultimately escaping so as to cause injury to lower land.¹⁴⁴ It has further been held that the establishment of a sewage lagoon beside a frequently cropped marsh is a non-natural user of land rendering a municipality liable under the rule for damage caused by escaping effluent.¹⁴⁵ The indications are, then, that water stored on land for purposes of utilization or redistribution come under the rule.

The problem of defining non-natural user is seemingly bound up in the concept of risk. It is a non-natural user of land to create a high degree of risk of injury to neighbouring property. The use will be classified as non-natural or natural depending upon the extent to which the particular circumstances of the case mitigate the risk of injury. At the same time, however, regard must be had for the fact that community development may be of significance in determining

138. (1955), 35 M.P.R. 13, at p. 23.

139. *Salmond on Torts* (London, 1965), 14th ed., pp. 453-4.

140. *Blake v. Woolf*, [1898] 2 Q.B. 426; *Rickards v. Lothian*, [1913] A.C. 236.

141. See *Crown Diamond Paint Co. Ltd. v. Acadia Holding Realty Ltd.*, [1952] 2 D.L.R. 541, where Rand J. held the defendant liable, it being a non-natural user with regard to the requirements of the defendant and to the general use of water to maintain pipes in the manner adopted by the defendant. It is implicit, however, that the normal use of water would take the cause out of the rule. This, in fact, was the position taken by Locke J., dissenting, who held the rule did not apply for want of evidence of non-natural user.

142. *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.*, [1914] 3 K.B. 772.

143. *Rylands v. Fletcher* (1866), 1 Ex. 265; (1868), 3 H.L. 330.

144. *Skanes v. Town Council of Wabana* (1958), 12 D.L.R. (2d) 846.

145. *Lawrys v. Town of Kipling* (1964), 48 D.L.R. (2d) 660. The suggestion was made, however, that the construction of a lagoon near a river or creek, to take away effluent, might not be a non-natural user.

what may be classed as a non-natural use of land.¹⁴⁶ Where water development projects attain acceptance as playing a functional role within the community, it may well be that user of land for these purposes will no longer be regarded as non-natural. And where sizeable public benefits can be seen to flow from such projects, public policy may conceivably favour a shifting of the risk of loss away from the landholder who has undertaken the project, onto the injured party who has accepted the benefits of the project. In effect, then, the evaluation of the risk factor involves the delicate process of balancing the various interests affected.

Some question has arisen as to liability in respect of the accumulation and storage of water already present on the land by forces of nature. For instance, in *Oliver v. Francis*,¹⁴⁷ the defendant dammed up surface water flowing in a coulee. The water broke through the dam onto adjoining lands. In denying relief, Simmons J. held that the rule in *Rylands v. Fletcher* does not apply where the accumulation is created by damming up a natural flow of surface water. This decision must be compared, however, with the case of *Christa v. Marshall*.¹⁴⁸ There the rule in *Rylands v. Fletcher* was held to be applicable in respect of an escape of water which had been extracted from artesian wells within the property. There would seem to be little difference between the act of accumulating water which flows on the surface, and accumulating ground water which must first be brought to the surface. The emphasis ought not to be placed upon the source of water stored upon the land, for it is the actual accumulation of water in such a manner as to create a distinct risk of injury that warrants the imposition of liability. The law on the point is summarized by *Salmond*:

A person is liable, however, even for the escape of things naturally on his land, if he has artificially accumulated them there so that their escape does more mischief than it would otherwise have done. If he collects in a reservoir the rainwater that falls upon his land, he is no less responsible for its escape than if he had brought the water in pipes from elsewhere.¹⁴⁹

It should also be stressed that the accumulation must be deliberate. Absolute liability is imposed because the defendant has deliberately undertaken a hazardous project and should be prepared to bear the risk inherent in his venture. In the absence of this factor, normally negligence will have to be proved before liability will attach.

Several other points pertaining to a claim under the rule in *Rylands v. Fletcher* should be considered. First, liability attaches only in respect of an escape from land within the control of the defendant onto neighbouring property outside his control. The rule has no application to injuries incurred within the confines of land controlled by the defendant.¹⁵⁰

146. See, for instance, *Vaughn v. Halifax-Dartmouth Bridge Commission* (1961), 46 M.P.R. 14, where a claim was made in respect of paint damaging an automobile in a parking lot near a bridge which was being spray-painted. Currie J., refusing to apply *Rylands v. Fletcher*, observed at p. 22: "Modern transportation has brought about a revolution in the former uses of land." See also *Read v. J. Lyons & Co.*, [1946] 2 All E.R. 471, at p. 477, where Lord Macmillan said: "... were it necessary to decide the point, I should hesitate to hold that in these days and in an industrial community it was a non-natural user of land to build a factory on it and conduct there the manufacture of explosives."

147. (1919), 14 Alta. L.R. 509.

148. [1945] 3 D.L.R. 459.

149. *Salmond on Torts* (London, 1965), 14th ed., p. 456; the same proposition in an earlier edition was approved in *Vaughn v. Halifax-Dartmouth Bridge Commission* (1961), 46 M.P.R. 14, at p. 17.

150. *Read v. J. Lyons & Co.*, [1946] 2 All E.R. 471.

Second, absolute liability does not attach where the damaging substance is accumulated on the defendant's premises with the consent of the injured party.¹⁵¹ It is conceivable, then, that where a water storage project is established for the benefit of surrounding landowners, a person who has implicitly consented to the scheme by accepting benefits would be precluded from recovering damages in respect of injury inflicted by escaping waters, unless he could prove negligence. It is also clear that where the plaintiff is himself responsible for the escape of the water, he cannot invoke the rule.¹⁵²

Third, absolute liability will not attach where the damage is proved to have been caused by the intervention of certain outside forces. Where the release of water is brought about by the act of a trespassing third party, the landholder will be absolved from liability unless the intervention was such as should have been anticipated by the landholder, and guarded against.¹⁵³ Similarly, if the defendant can prove that the damage was caused by an "act of God", he will be relieved from liability.¹⁵⁴ An "act of God" has been defined as "an interference in the course of nature so unexpected that any consequence arising from it is to be regarded as too remote to be a foundation for successful legal action."¹⁵⁵ If the natural agency is capable of being foreseen, it cannot be classified as an act of God. For instance, a heavy rainfall causing water to overflow will not be classified as an act of God unless it is so unusual as to be beyond the limits of reasonable expectation; evidence that such a rainfall had not been experienced for a considerable period of time might be sufficient for this purpose.¹⁵⁶ Normally, however, spring flooding will not fall into this category, owing to its foreseeability.¹⁵⁷ It can be seen, then, that what this third proposition generally amounts to is that a landholder will not be held liable for injuries caused by a supervening force if he can establish that he was not negligent in failing to anticipate it and to guard against injury.

THE RIGHT TO RESTRAIN POLLUTION

The general rule is that if a person pollutes surface water which flows across his land onto his neighbour's property, his neighbour may maintain an action for

151. *Att.-Gen. v. Cory Bros. & Co.*, [1921] 1 A.C. 521, at p. 539.

152. *Fletcher v. Rylands* (1866), 1 Ex. 265, at pp. 279-80.

153. *Box v. Jubb* (1879), 4 Ex. D. 76; *Rickards v. Lothian*, [1913] A.C. 263.

154. *Nichols v. Marsland* (1876), 2 Ex. D. 1; *Fletcher v. Rylands* (1866), 1 Ex. 265, at p. 280; *Tomchak v. Rural Municipality of Ste. Anne* (1962), 33 D.L.R. (2d) 481.

155. *Tomchak v. Rural Municipality of Ste. Anne* (1962), 33 D.L.R. (2d) 481, at p. 490.

156. *Ibid.* In the *Tomchak* case liability was excluded on the basis that the flooding was due to an "act of God". The chances of flooding were one in seventy-one years. "The rule is that if a person is prevented from performing his duty without any fault of his own by an act of God, the law will excuse him": *per Monnin J.A.*, at p. 490. It should be noted that doubt has been expressed as to the application of this defence to a situation where flooding results from the damming up of a natural water-course. A person damming up a stream must anticipate injury occurring as a result of both ordinary and extraordinary natural occurrences so that his sole defence may be that the water would have flooded the land even in the absence of the dam: see *Corp. of Greenoch v. Caledonian Ry. Co. & Glasgow & South-Western Ry. Co.*, [1917] A.C. 556; also *Kelley v. Can. Nor. Ry.* [1950] 2 D.L.R. 760. This proposition may not apply, however, to the accumulation of surface water, and distinctions have been drawn between the two situations; see, for example, Lord Finlay L.C. in the *Greenoch* case, at p. 573, and Monnin J.A. in the *Tomchak* case, at p. 491. There is certainly an argument, however, that, on principle, such a distinction is unsupportable, and that extraordinary precipitation causing accumulated surface water to overflow can never be viewed as an act of God.

157. See *Oliver v. Francis* (1919), 14 Alta. L.R. 509, *per Harvey C.J.*

whatever damage is caused by the pollution either in respect of the land itself or in respect of his ability to use the water. As is stated in *Gould on Waters*:

A land-owner who places noxious substances on his land, polluting the surface water or superficially percolating waters passing thence upon the premises of an adjoining owner to his injury, will be liable in an action for such pollution. But a land-owner across whose lot foul water flows from a higher source upon a lower estate, without any fault on his part, is not liable therefor.¹⁵⁸

While a landholder is free to appropriate surface water on his land and thereby deprive his neighbour of the benefit of the flow, he is not permitted to interfere with the quality of the flow by polluting it.

There is a noticeable paucity of Canadian cases on this problem; however, the issue was raised, at least tangentially, in *Brown v. Town of Morden*.¹⁵⁹ There the defendant corporation released large volumes of contaminated effluent from its sewage disposal plant into a depression running across the lands of both the plaintiffs and the defendant. Surface water flowed in the depression from time to time during the year. The plaintiffs claimed damages for injury to their crops and cattle from the contaminated effluent. The defendants were held liable for causing flooding by increasing the flow of water in the depression. The court heard evidence, as well, of the degree of contamination effected by the defendant, but Monnin J. was of opinion that the plaintiff had failed to adduce sufficient evidence to prove pollution of the water by the discharged effluent. There is some indication in the judgment, however, that if the plaintiff had successfully proved pollution liability would attach on that basis as well.

What appears to set the pollution of surface water apart from the pollution of a lake, river or stream is the basis upon which the action must be brought. Where the water, alleged to be polluted, is water to which the doctrine of riparian rights applies, damages do not have to be proved by the plaintiff;¹⁶⁰ all he need substantiate is that the water is in fact polluted; this constitutes an interference with his right to receive water unaffected as to quality. The pollution of surface water, on the other hand, normally constitutes a nuisance, so that a plaintiff landholder must establish, first, that the water he receives is in fact polluted; second, that the defendant has caused or contributed to the pollution; and, third, that he has suffered injury either to his property, or in respect of his use and enjoyment of the water or of the land upon which the water flows.

It should further be pointed out that if a landholder is not able to prove that the water has been polluted, he is not entitled to maintain an action merely because the act of a higher landholder in the use of his land renders the surface water unfit for some specialized use contemplated by the lower landholder. Such an action could only be founded on a property interest in the water vesting in the lower landholder prior to the time it reaches the lower land, a right which, as

158. *Gould on Waters* (Chicago, 1883), p. 476.

159. (1958), 24 W.W.R. 200. Other cases involving liability for nuisance caused by polluted surface water were *Portage la Prairie v. B.C. Pea Growers Ltd.* (1966), 54 W.W.R. 477 (Sup. Ct. Can.) *Paramuschuk v. Meadow Lake* (1965), 47 D.L.R. (2d) 427; *Roberts v. City of Portage la Prairie* (1968), 2 D.L.R. (3d); 373; aff'd (1969), 6 D.L.R. (3d) 96.

160. See p. 219.

has been explained earlier, does not exist. This state of the law poses a considerable problem in evaluating the possibilities of implementing multiple usage cycles for the maximum utilization of surface water resources. A landholder using surface water has no obligation to render the water fit for subsequent use by a landholder farther down the line of flow.

CHAPTER NINETEEN

Ground Water at Common Law

By Alan D. Reid

USE AND INTERFERENCE

The designation "ground water" applies to water that collects or flows or percolates beneath the surface of the land and is invisible to the naked eye of one who stands on the surface. For most purposes, however, ground water is classed with casual surface water and, insofar as they are applicable, the rules respecting surface water govern the rights to use and interfere with ground water.¹

A significant distinction between the two classes lies in the type of legal problem raised by each. Problems respecting surface water are to a great extent nuisance-oriented; at issue in a vast number of cases is liability for damage occasioned by diversion. Problems respecting ground water, however, to a great extent are resource-oriented; at issue is liability for an interference with one's right to use the water. The explanation probably lies in the fact that, historically, ground water has played a more prominent role than surface water in fulfilling basic needs of both a domestic and an industrial nature.

A further observation is that the foundation for the law respecting ground water was laid in an age when hydrology and geology lacked the degree of sophistication and acceptance achieved today. A general ignorance of natural processes beneath the surface of the ground has dictated legal rules that are still applicable today and that take into account, primarily, only that which is cognizable with the naked eye from the surface.

English common law appears to have articulated only two classifications within the broad category of ground water. These are percolating waters and underground streams. Considerable legal significance attaches to the classification adopted in any given situation.

Of basic importance is the general rule that there is no difference between the legal incidents of a stream flowing beneath the surface of the land and one flowing across the surface. Each is a stream to which the doctrine of riparian

1. See, for example, the English treatise, Coulson & Forbes, *Waters and Land Drainage* (London, 1952), 6th ed., which groups these two categories into one chapter on surface and percolating waters.

rights attaches. Accordingly the holder of land under which a stream flows has rights to use the water which are tempered by equal rights vested in all other holders of land through which the stream flows.²

On the other hand, where subterranean water does not flow in a definite underground channel, but merely oozes through the soil, or collects in underground accumulations beneath the surface, the holder of overlying land has the same right to appropriate the water as he does in respect of surface water collecting on his land. This is so notwithstanding that the water may have oozed through adjacent properties before accumulating beneath the surface of the landholder's property, and notwithstanding that the appropriation may interfere with some long established use of the water on the part of some other landholder. This rule is based to a great extent on a lack of definitive status and a lack of permanence attributable to this type of water. As was stated by Lord Chelmsford in *Chasemore v. Richards*,³ in rejecting the application of the law of riparian rights to percolating waters:

But it appears to me that the principles which apply to flowing water in streams or rivers, the right to the flow of which in its natural state is incident to the property through which it passes, are wholly inapplicable to water percolating through underground strata, which has no certain course, no defined limits, but which oozes through the soil in every direction in which the rain penetrates. There is no difficulty in determining the rights of the different proprietors to the usufruct of the water in a running stream. Whether it has been increased by floods or diminished by draught, it flows on in the same ascertained course, and the use which every owner may claim is only of the water which has entered into and become a part of the stream. But the right to percolating underground water is necessarily of a very uncertain description.

In *Chasemore v. Richards*, the defendant appropriated percolating waters supplying a stream that had been used by the plaintiff for a period of approximately sixty years. This user by the plaintiff, notwithstanding its duration, was held not to found a right of action, and the defendant's appropriation was held to be lawful even though, apart from legal considerations, it constituted a serious interference with the plaintiff's reliance interest. The House of Lords rationalized its decision on the basis that every use of land will in some way interfere with subterranean water supplies; however, the public interest in the cultivation and development of land must override any interest in preserving previously acquired rights to the use of water.

In another leading English case, *Acton v. Blundell*,⁴ the plaintiff operating a mill on his property, used water derived from a well driven into his soil. The defendant subsequently sank two coal pits into his land which had the effect of diminishing the supply of water in the plaintiff's well. In the absence of any evidence of a subterranean stream flowing beneath the surface of the two properties, the court held that the plaintiff had no cause of action, the defendant having acted within his rights in appropriating the percolating water before it reached the plaintiff's well. In an oft-cited judgment, Tindal C. J. struck at the root of the problem which would have arisen if vested rights in underground water supplies were given

2. *Wood v. Waud* (1849), 3 Ex. 748; 154 E.R. 1047; *Dickinson v. The Grand Junction Canal Co.* (1852), 7 Ex. 282; 155 E.R. 953; *Chasemore v. Richards* (1859), 7 H.L.C. 349; 11 E.R. 140; *Schneider v. Town of Olds* (1969), 71 W.W.R. 380.

3. *Chasemore v. Richards* (1859), 7 H.L.C. 349, at pp. 374-5; 11 E.R. 140, at p. 150.

4. (1843), 12 M. & W. 324; 152 E.R. 1223.

judicial recognition—in anything but an advanced technological society, only confusion could result. Accordingly, only those uses of water which possess notoriety can support legal claims. He stated:

The question argued before us has been in substance this: whether the right to the enjoyment of an underground spring, or of a well supplied by such underground spring is governed by the same rule of law as that which applies to, and regulates, a watercourse flowing on the surface.

. . . .

The ground and origin of the law which governs streams running in their natural course would seem to be this, that the right enjoyed by the several proprietors of the lands over which they flow is, and always has been, public and notorious: . . . each man knowing what he receives and what has always been received from the higher lands, and what he transmits and what has always been transmitted to the lower. . . . But in the case of a well sunk by a proprietor in his own land, the water which feeds it from a neighbouring soil does not flow openly in the sight of the neighbouring proprietor, but through the hidden veins of the earth beneath its surface; no man can tell what changes these underground sources have undergone in the progress of time

. . . .

In the case of the running stream, the owner of the soil merely transmits the water over its surface: . . . the level of the water remains the same. But if the man who sinks the well in his own land can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbour from making any use of the spring in his own soil which shall interfere with the enjoyment of the well. He has the power, still further, of debarring the owner of the land in which the spring is first found, or through which it is transmitted, from draining his land for the proper cultivation of the soil: and thus, by an act which is voluntary on his part, and which may be entirely unsuspected by his neighbour, he may impose on such neighbour the necessity of bearing a heavy expense, if the latter has erected machinery for the purposes of mining, and discovers, when too late, that the appropriation of the water has already been made. Further, the advantage on one side, and the detriment to the other, may bear no proportion. . . . And, lastly, there is no limit of space within which the claim of right to an underground spring can be confined: in the present case, the nearest coalpit is at the distance of half a mile from the well: it is obvious the law must equally apply if there is an interval of many miles.

Considering, therefore, the state of circumstances upon which the law is grounded in the one case to be entirely dissimilar from those which exist in the other; and that the application of the same rule to both would lead, in many cases, to consequences at once unreasonable and unjust; we feel ourselves warranted in holding, upon principle, that the case now under discussion does not fall within the rule which obtains as to surface streams, nor is it to be governed by analogy therewith.⁵

Implicit in this passage is a realization that ground water may be of fundamental importance to landholders as a natural resource; but also there appears a resignation to the fact that there was no practical or expedient basis upon which to articulate legal rules promoting its maximum utilization. Accordingly, the law was put squarely on an appropriative basis.

Some reservation was expressed by Lord Wensleydale, in *Chasemore v. Richards*, in terms of an insistence on conditioning the appropriative right on a criterion of reasonable user. He was concerned that the defendant's appropriation was for purposes of augmenting a municipal water supply; his feeling was that the

5. (1843), 12 M. & W. 324, at pp. 348-52; 152 E.R. 1223, at pp. 1233-4.

right of appropriation should be limited to purposes relating directly to activities carried on within the boundaries of the property upon which the appropriation was made. He said:

The question in this case, therefore, as it seems to me, resolves itself into an inquiry, whether the Defendant exercised his right of enjoying the subterraneous waters in a reasonable manner. Had he made the well and used the steam-engines for the supply of water for the use of his own property, and those living on it, there could have been no question. If the number of houses upon it had increased to any extent, and the quantity of water for the families dwelling on the property had been proportionately augmented, there could have been no just grounds of complaints. But I doubt very greatly the legality of the Defendant's acts in abstracting water for the use of a large district in the neighbourhood, unconnected with his own estate, for the use of those who would have no right to take it directly themselves, and to the injury of those neighbouring proprietors who have an equal right with themselves. It does not follow that each person who was supplied with water by the Defendant could have dug a well himself on his own land, and taken the like quantity of water, so that the Defendant may have taken much more than would have been abstracted if each had exercised his own right.

The same objection would not apply to the abstraction of water for the use of the dwellers on the Defendant's land, even though they carried on trades requiring more water (breweries, for example) than would be used for mere domestic purposes; it would still be for their purposes only. But in this case there has been an abstraction of water for purposes wholly unconnected with the enjoyment of the Defendant's land.⁶

The existence of such a restriction on the doctrine of appropriation, however, was raised by neither Lord Chelmsford nor Lord Cranworth, and was apparently rejected by Lord Kingsdown; furthermore, subsequent cases have failed to impose the reasonable use doctrine upon the common law right to appropriate water percolating beneath the surface.⁷ In fact, the House of Lords, in *Bradford v. Pickles*,⁸ affirmed the proposition that a landholder may appropriate percolating water to his own use without putting in issue the motivation for his act. Appropriation, even for malicious reasons, was held to be free from liability. In this case, the appellant corporation acquired property containing springs and streams that were used to feed a waterworks project to supply the domestic needs of the inhabitants of the municipality. The respondent owned higher land adjacent to the appellants' property. He sank a shaft and drove a level through his land to drain the strata, purportedly with a view to working minerals. It was apparent that these acts would result in a permanent diminution of water supplies for the municipality. The appellant sought an injunction, alleging that the respondent did not have a *bona fide* intention to work his minerals and that his intention was to injure the appellants with a view to inducing them either to purchase his land or to offer him some compensation. The House of Lords refused the injunction, holding that the respondent had a right to abstract the water beneath the surface and that this right existed regardless of his motives. Lord Halsbury L. C. said:

6. (1859), 7 H.L.C. 349, at pp. 388-9; 11 E.R. 140, at pp. 155-6.

7. This seems to be implicit in the recent case of *Schneider v. Town of Olds* (1969), 71 W.W.R. 380, which suggests that, apart from the statutory requirement for a licence, a municipality may appropriate ground water for supply purposes, notwithstanding the detrimental effect on an adjoining owner, whose supply is depleted.

8. [1895] A.C. 587.

The facts that are material to the decision of this question seem to me to lie in a very narrow compass. The acts done, or sought to be done, by the defendant were all done upon his own land, and the interference, whatever it is, with the flow of water is an interference with water, which is underground and not shewn to be water flowing in any defined stream, but is percolating water, which, but for such interference, would undoubtedly reach the plaintiffs' works, and in that sense does deprive them of the water which they would otherwise get. But although it does deprive them of water which they would otherwise get, it is necessary for the plaintiffs to establish that they have a right to the flow of water, and that the defendant has no right to do what he is doing.

My Lords, I am of opinion that neither of these propositions can be established.⁹

This is not a case in which the state of mind of the person doing the act can affect the right to do it. If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it. Motives and intentions in such a question as is now before your Lordships seem to me to be absolutely irrelevant.¹⁰

There is little to indicate that English law on this point has developed beyond this point. It seems safe to say that the right to appropriate percolating water in English common law is not limited by a doctrine of reasonable user. The doctrine has received some acceptance, however, in some of the American jurisdictions and is set out in *Corpus Juris Secundum* as follows:

In some states, the rule of the common law followed in early decisions has given way to the doctrine of reasonable use limiting the right of a landowner to percolating water in his land to such an amount of water as may be necessary for some useful or beneficial purpose in connection with the land from which it is taken, not restricting his right to use the water for any useful purpose on his own land, and not restricting his right to use it elsewhere in the absence of proof of injury to adjoining landowners.¹¹

There is no indication that Canadian law has adopted the reasonable use limitation. However, there is a paucity of case law on the point. In one of the few reported decisions, *Storms v. M. G. Henniger Ltd.*,¹² an Ontario case, the plaintiff operated a cheese factory on property next to that of the defendant. For a long period of time the plaintiff had used water from a spring on the defendant's property that flowed through his own property. The defendant, in the course of excavating upon his land to obtain gravel, inadvertently changed the underground flow into the spring so as to prevent the water from supplying the spring. It was held that the defendant had a right to tap the underground source notwithstanding the plaintiff's economic reliance on the water. Laidlaw J. A., in dismissing the action, did address himself in limited fashion to the character of the defendant's user. He said:

My opinion is that the appellant Gonu could not restrain the owner of the land in the vicinity of the spring from using it for the purpose of recovery and removal of the available sand and gravel in it. That, as I have said, was a *natural user* of the land and it was his right to permit the defendant to enter on the land and excavate the sand and gravel. There was no evidence of any breach of duty owing by the defendant to the plaintiff...¹³

9. *Ibid.*, at pp. 591-2.

10. *Ibid.*, at p. 594.

11. 93 C.J.S., pp. 771-2, citing the following examples: Arizona: *Bristor v. Cheatham*, 255 P.2d 173; California: *Peabody v. City of Vallejo*, 40 P.2d 486; Florida: *Labruzzo v. Atlantic Dredging & Const. Co.*, 54 So.2d 673; Kentucky: *United Fuel Gas Co. v. Sawyers*, 259 S.W.2d 466; *Sycamore Coal Co. v. Stanley*, 166 S.W.2d 293; Tennessee: *Nashville, C. & St. L. Ry. v. Rickert*, 89 S.W.2d 889; Utah: *Silver King Consol. Mining Co. v. Sutton*, 39 P.2d 682; Wyoming: *Binning v. Miller*, 102 P.2d 54, 61; Oklahoma: *Canada v. City of Shawnee*, 64 P.2d 694, 696.

12. [1953] 4 D.L.R. 300.

13. *Ibid.*, at p. 306, emphasis added.

There is no indication, however, that Laidlaw J. A. was recognizing an essential criterion in natural or reasonable user; this issue would have squarely arisen only if he had been of opinion that the defendant was creating an extraordinary and ostensibly unwarranted interference.

To a considerable extent, then, the applicability of the doctrine of reasonable user may be described as an open issue. It may be of some relevance to emphasize that no recent authority has precluded its acceptance into Canadian jurisprudence. In addition, contemporary emphasis upon the vital importance of the utilization of ground water resources may be a significant influence towards reshaping a foundation for legal relief to conform with the demands of a modern age. Clearly, a proper sharing of the resource depends upon a re-evaluation of this long-established practice of ignoring the use to which the water is put.

CHARACTERIZATION OF SUBTERRANEAN STREAMS

The general rule has been stated above that water flowing in a subterranean stream is subject to the law of riparian rights. Of significance, then, is the problem of establishing whether subterranean water is in fact flowing in a stream. For if this salient fact cannot be established, the water is subject to wholesale appropriation. Some of the considerations to be raised in determining whether percolating water can be called a stream were discussed by Lord Watson in the case of *M'Nab v. Robertson*:

I see no reason to doubt that a subterraneous flow of water may in some circumstances possess the very same characteristics as a body of water running on the surface; but, in my opinion, water, whether falling from the sky or escaping from a spring, which does not flow onward with any continuity of parts, but becomes dissipated in the earth's strata, and simply percolates through or along those strata, until it issues from them at a lower level, through dislocation of the strata or otherwise, cannot with any propriety be described as a stream.¹⁴

Here the decisive criterion is notoriety, and the problem is the physical barriers precluding cognition of the habits of subterranean flows. The ascertainment of a right to receive water from a subterranean flow depends upon the establishment of proof of *knowledge* that the water is flowing in a subterranean stream; and in the formative years of the legal principles relating to this question, *knowledge* was somewhat more dependent on common sense than hydrological fact.

Considerable guidance on this question is offered by the leading treatise, Coulson and Forbes, *Waters and Land Drainage*.¹⁵ What has to be established to prove that water flows in a subterranean stream is that it flows in a "known and defined channel". A "defined channel" is said to be "a constructed and bounded channel, although the course of the stream may be undefined by human knowledge." "Known" is said to mean "the knowledge by reasonable inference from existing and observed facts in the natural or pre-existing condition in the surface of the ground." It is for the plaintiff to establish that the defendant had or ought to have had knowledge of the subterranean stream so as to circumvent the policy consideration, enunciated by Tindal C. J. in *Acton v. Blundell*,¹⁶ that landholders

14. [1897] A.C. 129, at p. 134.

15. Coulson and Forbes, *Waters and Land Drainage* (London, 1933), 5th ed.

16. (1843), 12 M. & W. 324; 152 E.R. 1223. See pp. 406-7.

ought not to be placed in peril of liability for actions undertaken on their land, the ramifications of which are unforeseeable. A plaintiff must justify his expectation of receiving subterranean waters by establishing knowledge of a defined channel which has been interfered with by the defendant. And in doing so, it is clear that he is not permitted to prove his case by offering scientific evidence ascertaining the boundaries of the channel, obtained only after he has raised the issue by serving a writ of summons on the defendant. As reasonable as such evidence might seem in a technological or scientific age, its deficiency is apparent when viewed from the perspective of a nineteenth century defendant who has expended considerable sums on a project dependent on the utilization of underground water resources. How is he to know that the water he is tapping is flowing in a defined underground channel? Is he required to be put to the expense of conducting a geological survey? This would certainly have amounted to a serious retardation of land development by enterprising landowners, and contravened the policies in vogue at that time. The whole attitude of the law to the resolution of these difficult problems has been described as a reflection of the ancient Roman conception, "*aequum et bonum*"—what is fair and reasonable as between the parties? And it was felt to be unfair and unreasonable as between the parties to hold a man liable for interfering with a stream that was not a "known" stream at the date of interference and became "known" only by geological excavation subsequent to the date of the interference.¹⁷

It has been suggested that the relevant time for possessing knowledge is the date of issue of the writ. Probably even this is unsupportable; presumably the defendant's immunity would extend to all acts of interference committed before the water is established to be flowing in a known and defined channel.¹⁸ This, of course, does not mean that an action will not lie where the existence of a subterranean course has been established by geological exploration prior to the defendant's abstraction of water. This would clearly be a case of actual knowledge. As was stated by Luxmoore J. in *Bleachers' Association, Limited, and Bennett and Jackson, Limited v. The Rural District Council of Chapel-en-le-Frith*:

... once it is established that there is a defined underground channel and that its course can be ascertained with reasonable certainty, the rights of the lower riparian owner are crystallized and any fresh act of interference or abstraction—which *ex hypothesi* must be done with knowledge of those rights—must then be actionable; in other words the liability for abstraction or interference must depend on the knowledge of the actor at the time the act complained of is committed and not on the manner in which that knowledge has been obtained.¹⁹

17. See *Bradford Corp. v. Ferrand*, [1902] 2 Ch. 655, at p. 663.

18. *Bleachers' Association, Limited, and Bennett and Jackson, Limited v. The Rural District Council of Chapel-en-le-Frith*, [1933] 1 Ch. 356, per Luxmoore J. where in discussing *Bradford Corp. v. Ferrand* he says at p. 363: "The point of law was I think confined to the case where the existence and course of the defined channel is not known at the date of the issue of the writ and cannot be ascertained except by excavation subsequent to its issue . . ." This may, however, take too narrow a view of the judgment of Farwell J. in that case. The point of the decision seems to be that there is inequity in holding a person liable for an interference which can only be determined to be unlawful interference by *ex post facto* geological examination. There is nothing to suggest that, even if the geological evidence established a "known, defined channel" by the date of issue of the writ, this would have any effect on previously committed interferences. Farwell J. does not discuss the question of continued interferences once the stream has become "known" by geological exploration.

19. [1933] 1 Ch. 356, at pp. 363-4.

Luxmoore J. went on to adopt the words of Eyre Chatterton V.C. in *Black v. Ballymena Township Commissioners*²⁰ on the question of proving knowledge of the flow:

The onus of proof lies, of course, on the plaintiff claiming the right, and it lies upon him to show that without opening the ground by excavation, or having recourse to abstruse speculations of scientific persons, men of ordinary powers and attainments would know, or could with reasonable diligence ascertain, that the stream, when it emerges into light, comes from, and has flowed through, a defined subterranean channel. The instance given in some of the cases of a stream sinking underground when it reaches a certain place, and pursuing for a short space a subterranean course, and then emerging, shows plainly the kind of knowledge required. No one knows as a matter of fact that it flows underground from the one point to the other in a defined channel, or indeed even that it is the same stream; but our reason, grounded on our knowledge of ordinary natural laws, and on the impossibility or great improbability of the phenomena being otherwise accounted for, leads to an inference of fact, amounting practically to knowledge, that it is the same stream, and that it has flowed underground in a defined channel. The question of fact to be determined in such cases is whether the water appearing at a given point, and then becoming a surface stream, comes from subterraneous percolation or oozing, or flows in a defined channel or watercourse underground to the point where it so appears; and for the decision of that question it lies on the party asserting his right to the flow to show affirmatively, not as a matter of fact, but as a reasonable inference from known facts, that the water comes to the place of emergence, not by percolation or oozing, but in a defined channel. Beyond this I do not think proof of knowledge can be required without destroying the claim of right to the flow of underground streams altogether.²¹

The foundations of the common law in the Atlantic Provinces with respect to ground water are the principles expressed in the English cases referred to above. Some question must be raised, therefore, as to the ability of our courts, relying on these principles, to cope with contemporary problems in a scientific age stressing the development of water resources for maximum utilization for the diversified interests existing in the community. The law appears to leave open the possibility of serious economic deprivation for industrial and municipal developments which have already been established on the strength of existing ground water deposits. Because an underground flow may not be perceptible as such, the possibility of a total appropriation of the resource by an adjoining concern, subsequently established, is a distinct risk. This is so even where general industrial development may be dependent on a sharing of the resource, and a definite hydrological flow could be detected which would allow for such a program of sharing, despite the fact that the flow might not be in a "known and defined channel" so as to support riparian rights under the existing law. Arguably, a revised legal structure is needed to accommodate a revised concept of the public interest; existing rules were developed in an age when no scientific basis for apportionment could be detected, and when expediency dictated arbitrariness so as to preclude a deluge of insoluble litigation. However, as science develops to the point where rational apportionment is both feasible and essential, new approaches must be adopted.

On the other hand, the present legal structure would probably not impede future programs for ground water resource utilization. Such projects would undoubtedly be based upon geological and hydrological surveys which would

20. (1886), 17 L.R. Ir. 459.

21. [1933] 1 Ch. 356, at pp. 365-6.

provide the element of knowledge upon which the common law is dependent, and further would be authorized by legislation which could adjust to the difficulties inherent in the common law structure.

PREScription OF RIGHTS

The abstraction of percolating water over a long period of time does not give rise to the existence of a right to restrain interferences on the part of adjoining landholders. In *Chasemore v. Richards*, Wightman J. rejected the suggestion that a person might invoke the presumption of lost modern grant to ground a prescriptive right. He said:

In such a case as the present, is any right derived from the use of the water of the River Wandle for upwards of twenty years for working the Plaintiff's mill? Any such right against another, founded upon length of enjoyment, is supposed to have originated in some grant which is presumed from the owner of what is sometimes called the servient tenement. But what grant can be presumed in the case of percolating waters, depending upon the quantity of rain falling or the natural moisture of the soil, and in the absence of any visible means of knowing to what extent, if at all, the enjoyment of the Plaintiff's mill would be affected by any water percolating in and out of the Defendant's or any other land? The presumption of a grant only arises where the person against whom it is to be raised might have prevented the exercise of the subject of the presumed grant; but how could he prevent or stop the percolation of water? The Court of Exchequer, indeed, in the case of *Dickinson v. The Grand Junction Canal Company*, expressly repudiates the notion that such a right as that in question can be founded on a presumed grant, but declares that with respect to running water it is *jure naturae*. If so, *a fortiori*, the right, if it exists at all, in the case of subterranean percolating water, is *jurae naturae*, and not by presumed grant, and the circumstance of the mill being ancient would in that case make no difference.²²

It would seem clear, as well, that an exclusive right to appropriate percolating water cannot be prescribed under the limitation statutes in effect in the several provinces. Such a right is acquired by setting up proof of adverse user for a period beyond that which the statute allows an action to be brought against the person seeking to establish the prescriptive right. The application of the statute is conditional, however, on proof of the fact that the long established user has violated some right vested in another person. Under the appropriation doctrine, on which right of user is based, this can never occur.

On the other hand, where the abstraction is of water flowing in an underground channel, to which the law of riparian rights applies, it is possible to prescribe a right in the same manner in which a right in derogation of all riparian rights may be prescribed.²³

EASEMENTS AND PROFITS À PRENDRE IN PERCOLATING WATERS

Whereas a right to receive percolating water cannot be prescribed in an absolute sense, it can be the subject of an easement, which, in general terms, is a right to enjoy the use of another person's land for purposes beneficial to one's own. For example, a landholder may acquire by grant or prescription a right to enter

22. (1859), 7 H.L.C. 349, at p. 370; 11 E.R. 140, at pp. 148-9. See also *Harrison v. Harrison* (1883), 16 N.S.R. 338, at pp. 342-3.

23. See pp. 215-7.

upon and take water from a well on his neighbour's land.²⁴ It should be emphasized, however, that this right is relative, in the sense that it is conditioned by factors which might affect that person's rights in respect of the water in the well. Accordingly, if yet a third landholder were to abstract the water before it percolated into the well, as, it has been shown, he is entitled to do *viz a viz* the owner of the land upon which the well is situated, the holder of the easement cannot complain, for his rights can be no greater than the rights of the person who has granted the easement, or against whom the easement has been prescribed.

It is also settled that a right to take water cannot be the subject of a *profit à prendre*.²⁵ This has been defined as "a right for a man, in respect of his tenement, to take some profit out of the tenement of another man".²⁶ A right to take water, if such a right exists, must be either in the nature of an easement or a licence.²⁷ The main significance of this rests in the nature of the remedies available to the holder of the servitude.²⁸

Such private rights, then, are extremely limited, and have little, if any, effect upon the general principles affecting the use of, and interference with ground water.

SUBTERRANEAN BASINS

The classification respecting underground waters adopted by the English common law is noticeably deficient when the problem arises of ascertaining property rights in water which has accumulated in a natural subterranean basin underlying the surface of lands owned by more than one landholder. The precise problem is whether one landholder may exercise an appropriative right to the extent of draining the basin. This is of particular significance when each of the overlying landholders is dependent upon water in the basin for purposes connected with his land. Under the common law approach, the legality of the appropriation will necessarily depend on the classification adopted with respect to this type of accumulation. If the water is classified as ground water flowing in a known and defined channel, a landholder's right of user will be restricted by similar rights vested in other overlying landholders. On the other hand, if, as appears to be the case, the water is classified as percolating water, each overlying landholder has an unrestricted right to appropriate the entire volume of water for whatever purpose he wishes.

An authority somewhat in point is *The Salt Union, Limited v. Brummer, Mond & Co.*²⁹ The plaintiffs and the defendants owned interconnected dry salt mines which had partially collapsed. Water had collected in the passages so as to form an extensive reservoir underlying the network of mines, and the mining operations were modified to a technique of brine pumping. The defendants pumped a considerable volume of brine from the reservoir and it was accepted as a matter

24. See *Paine & Co., Ltd. v. St. Neots Gas & Coke Co.*, [1939] 3 All E.R. 812.

25. *Race v. Ward* (1855), 4 E. & B. 702; 119 E.R. 259.

26. Jowitt, *The Dictionary of English Law* (London, 1959), p. 1421.

27. *Paine & Co., Ltd. v. St. Neots Gas & Coke Co.*, [1939] 3 All E.R. 812, at p. 823, *per* Luxmore L. J.

28. *Ibid.* An owner of an easement cannot bring an action in trespass, his only remedies being by abatement or by action for nuisance.

29. [1906] 2 K.B. 822.

of fact that, in so doing, they abstracted a considerable portion of the salt deposits underlying the plaintiffs' property. The court decided in favour of the defendants, taking the view that the brine had percolated beneath the defendants' property naturally as they pumped brine from their own mines. In so holding, the court apparently proceeded on the premise that a man may pump, on his own land, underground water even though, prior to the pumping, some of the water that is eventually appropriated in fact underlies adjoining lands.

Another possible authority is *The Ballacorkish Silver, Lead, and Copper Mining Company, Limited v. Harrison*.³⁰ Here the Privy Council refused to hold a mining lessee liable, by working mines, for draining wells and springs upon land in the possession of the plaintiff landlord. In the course of his judgment, Lord Penzance adverted to the general proposition that a landholder may lawfully appropriate water that has percolated naturally into wells underlying an adjacent landholder's property, even where the natural percolation has been stimulated by some artificial activity undertaken upon the land of the appropriating landholder.³¹ It is a short step from these pronouncements to uphold the legality of the appropriation of water from a larger deposit, a subterranean basin, underlying several properties.

It appears, then, that, insofar as ground water does not flow in a defined channel but percolates by natural gravitation beneath the surface of the land, no cause of action arises even if the percolation is caused solely by the act of the landholder pumping water from his own land. The sole restriction on a landholder would seem to be that he cannot directly pump water underlying a neighbour's land, for instance by driving a shaft from his property diagonally into a water deposit underlying his neighbour's land.

It is evident that this state of the law could be detrimental in a situation where two landholders are dependent upon a common underlying deposit. Especially is this so in the absence of a reasonable use doctrine which might preclude a landholder from appropriating the water for purposes unconnected with his land. A more satisfactory solution might be to analogize between this type of subterranean deposit and a similar surface accumulation, such as a lake or a pond. The law recognizes riparian rights vesting in landholders bordering on a lake, which is reasonable inasmuch as both the permanent boundaries and the common benefits to adjacent lands are judicially cognizable and enforceable. Assuming these two criteria are attributable to waters accumulating in subterranean basins, there appears to be no reason why riparian rights ought not to attach to such deposits. This is especially so, bearing in mind that the fundamental legal distinction between percolating waters and underground streams was based on the recognition, first, that only in respect of a stream was more than one landholder in a position to utilize the resource in the course of the use and enjoyment of his land, and, second, that only in respect of a stream were the confines of the flow sufficiently defined and known so that the extent of the landholders' legal rights and liabilities was judicially cognizable. Whether the water is actually flowing is seemingly irrelevant; this is supported by the fact that riparian rights apply not only to rivers and streams but also to surface lakes and ponds. What is essential in the final analysis is that there is a perceptible resource capable of enjoyment by diversified interests,

30. (1873), L.R. 5 P.C. App. Cas., 49.

31. *Ibid.*, at pp. 60-1.

and that the rights and liabilities attendant thereto are capable of being judicially enforced with reasonable clarity and fairness. Where these criteria are met, a basis for sharing exists and ought to be given effect.

In many of the American authorities, special rules are set out respecting subterranean basins. For instance, in *Corpus Juris Secundum* it is stated:

The rule vesting the ownership of percolating waters in the owner of the land does not apply to the waters of an artesian basin underlying the lands of several owners.³²

And also:

Under the rule of correlative rights, the rights of all landowners over a common basin, saturated strata, or underground reservoir are coequal or correlative, and one cannot extract more than his share of the water, even for use on his own land, where others' rights are injured thereby.³³

These are modifications of the traditional common law approach dictated by circumstances of necessity. An interesting example of the application of the correlative rights doctrine is contained in the California case of *Pasadena v. Alhambra*,³⁴ otherwise known as the *Raymond Basin* case. Faced with the prospect of the depletion of water resources in a natural basin, the court imposed the doctrine adverted to above. All landholders who had drawn water from the basin for a period of five years were taken to have prescribed a right to draw up to that amount; however, where the total withdrawal exceeded the established safe yield, each pumper would be enjoined from pumping more than his proportionate share of the safe yield. This type of approach is more and more essential in an age where dependencies on underground waters are more vital and diversified than in past ages. The fact that domestic water supplies in many areas are dependent upon wells tapping underground deposits dictates the need for a legal structure which precludes depletion by appropriations which might have disastrous ramifications, yet which at present appear lawful on the basis of a case law developed during the previous century.

LIABILITY FOR REMOVAL OF SUPPORT

It is firmly established that a landholder has a right of action for damage occasioned by the removal of lateral support naturally given by adjacent soil. He does not have, however, a similar right in respect of support given by subterranean waters, even where the subterranean waters lie beneath his own lands. If a landholder abstracts ground water, thereby causing a subsidence of adjacent lands, no action lies. This principle was set out in the English case of *Popplewell v. Hodgkinson*³⁵ where the defendant, a builder, was engaged to erect a church upon property adjoining the plaintiff's land. In order to erect the church, the defendant was forced to excavate down to firm soil. As a result of this excavation, water was drained

32. 93 C.J.S., p. 767.

33. 93 C.J.S., p. 772.

34. (1949), 207 P.2d 17.

35. (1869), 4 Ex. 248; see also *Rade v. K & E Sand & Gravel (Sarnia) Ltd.* (1969), 10 D.L.R. (3d) 218.

from the plaintiff's land, causing the soil to subside, damaging buildings situated upon the land. No negligence on the part of the defendant was established. In holding for the defendant, Cockburn C. J. said:

Although there is no doubt that a man has no right to withdraw from his neighbour the support of adjacent soil, there is nothing at common law to prevent his draining that soil, if, for any reason it becomes necessary or convenient for him to do so.³⁶

The concluding words of the statement here quoted purport to condition the right to extract water on a criterion of reasonable user. Implicit is the proposition that if a landholder maliciously drains water with a view to causing his neighbour's property to subside he will be liable for damages. At first blush this might be seen to conflict with what was established later in the case of *Bradford Corporation v. Pickles*,³⁷ where the view was taken that motivation is an irrelevant consideration. It is submitted, however, that the propositions are reconcilable. There is a difference between maliciously abstracting water so as to deprive one's neighbour of the opportunity to appropriate it for his own use, and maliciously abstracting water so as to cause an injury to a neighbour's land. The latter course of action amounts to a use of property in such a manner as to cause injury to adjoining lands, which falls under the *sic utere* principle of nuisance law; a man may make only such use of his own property as will not injure his neighbour's property. A landholder need only submit to those injuries and annoyances which are occasioned by a natural and reasonable use of land in the particular circumstances of the situation; if a use of land by one man is unreasonable and injury results, liability will attach. As Salmond puts it:

If the defendant has created a nuisance, it is actionable; but the "reasonableness" of his conduct is relevant in determining whether he has in truth created a nuisance. . . . Therefore there is an exception to the general rule [as to nuisance] in the case of acts reasonably done which are necessary for the common and ordinary use of land and houses.³⁸

It is questionable, however, whether this exemption from liability would attach in respect of a subsidence caused by an appropriation for purposes unconnected with the use of the land upon which the appropriation has been made. It is conceivable, for example, that, in the absence of statutory immunity, a municipality might be held liable for damages resulting from a subsidence caused by an appropriation of water for municipal supply purposes.

A further problem might possibly arise where water underlying land conveyed to a purchaser is expressly reserved to the grantor in the deed, and, in the course of the extraction of water pursuant to the reservation, subsidence of the surface results. Here a comparison can probably be made with cases dealing with the reservation of mines and minerals. While the reservation of mines and minerals in a grant of land has been held to imply the right to obtain them,³⁹ this right does not extend to the point where the grantor may cause a subsidence of the surface

36. *Ibid.*, at pp. 251-2; see also *Gill v. Westlake*, [1910] A.C. 197.

37. See pp. 408-9.

38. *Salmond on Torts* (London, 1965), 14th ed., p. 98.

39. *Rowbotham v. Wilson* (1860), 8 H.L.C. 348, 11 E.R. 463; *Borys v. C.P.R.*, [1952] 3 D.L.R. 218.

by extracting the minerals,⁴⁰ unless either a more specific reservation is made to include this right of interference, or it is obvious at the time the reservation is made that the working of the mineral will necessarily involve the subsidence of the soil so that the reservation of this right of interference is implicit, or the mining is effected under statutory authority which contemplates subsidence.⁴¹ An injunction may normally be obtained by the owner to restrain removal of surface support under these circumstances.

COMPENSATION FOR DAMAGE TO LAND CAUSED BY EXPLORATION

The development of ground water resources entails exploration with a view to discovering the locality and extent of subterranean accumulations. To a considerable degree, this involves entering upon private property and interfering with the use and enjoyment of land by landholders. It is important, therefore, to consider the question of liability for damage occasioned to property on which exploration is conducted.

The first point to note is that exploration for water is not carried on as of right; it is permissive, requiring the consent of the owner of the property on which exploration is to take place. Unless altered by statute, such as those relating to mines and minerals which create public ownership, establish a licence structure and provide for compensation, exploration will be carried on under private lease or licence, and compensation for injury will be covered by the ordinary principles of landlord and tenant law.

Under the terms of such a lease, an explorer might well be expressly declared either impeachable or unimpeachable for waste. "Waste" denotes an alteration in the nature of the property arising out of the exploration. In the event that an explorer is by his lease held impeachable for waste, he must compensate the owner or person in possession of the land for whatever damages have been caused to the property. If the explorer is, on the other hand, by his lease made unimpeachable for waste, he is not liable for waste except insofar as a court would hold him liable for "equitable waste", which has been described as "wanton, malicious or unconscientious destruction",⁴² which a court of equity would not permit even by a tenant declared to be unimpeachable for waste. In the absence of a contractual stipulation in the lease, the court will not imply a covenant not to commit waste. However, the lessee may still be held liable for waste as a tort rather than as a breach of covenant.⁴³

The measure of damages for waste has been held to be the depreciation in the present value of the property brought on by the act of waste. It was further suggested by MacDonald J. in *Kopf v. Superior Oils Ltd.*,⁴⁴ a decision of the Alberta Supreme Court relating to liability for injuries caused by oil drilling, that where

40. See generally, *Hext v. Gill* (1872), 7 Ch. App. 699; *Love v. Bell* (1884), 9 A.C. 286; *Butterley Co., Ltd. v. New Hucknall Colliery Co., Ltd.*, [1910] A.C. 381; *Fuller v. Garneau* (1921), 61 S.C.R. 450.

41. *Fuller v. Garneau* (1921), 61 S.C.R. 450, at p. 457, *per* Duff J.; *Welldon v. Butterley Co. Ltd.*, [1920] 1 Ch. 130.

42. Anger and Honsberger, *Canadian Law of Real Property* (Toronto, 1959), p. 42.

43. *Kopf v. Superior Oils Ltd.*, [1952] 2 D.L.R. 572.

44. *Ibid.*

destruction of a particular use to which the land is ordinarily put is involved the principles to apply in assessing damages for waste are the same as those applying to compensation for land taken compulsorily. These principles were set out by Lord Dunedin in *Cedars Rapids Manufacturing and Power Company v. Lacoste* as follows:

(1.) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker.

(2.) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.⁴⁵

The foregoing outline of the legal structure reflects the approach taken by courts to the problem of compensating owners for damages caused to their lands by persons exploring for oil under private lease from the owner. While there appear to be no reported cases on compensation for damages caused by ground water exploration, it seems reasonable to conclude that the same principles would apply.

POLLUTION OF GROUND WATER

The pollution of subterranean waters, causing damage to the overlying landholder, is actionable on the same basis as the pollution of casual surface water.⁴⁶ Where the pollution is occasioned by a direct act or a negligent act resulting in a pollutant being carried into the water, there is little doubt that a cause of action will arise.⁴⁷ And where the use and development of land results in the pollution of ground water to the extent that it constitutes a nuisance to an adjacent landowner, an action will normally lie.⁴⁸

In other situations, however, liability is not so clear. For example, if a landholder were to appropriate such a large volume of percolating water from beneath his land that a drop in the water level in his neighbour's well resulted, allowing it to become contaminated, it is difficult to see that he would be liable; he is merely exercising his acknowledged right to appropriate the water, and at least insofar as his action is not motivated by malice, it appears lawful. This could be extremely significant on a larger scale, for example where one municipality depletes an underground water supply to such an extent as to allow sea water to contaminate the supply of another municipality. As the abstracted waters are percolating waters and may be freely appropriated, it is difficult to impose liability even where a severe pollution problem has been created.

Another situation where the pollution of ground water deposits might go unremedied is where a complainant has purchased land from a grantor who has reserved the right to mines and minerals and, in the course of working them, has polluted the ground water. A number of cases seem to affirm the right of the grantor or his assignee to extract his minerals notwithstanding that this causes an

45. [1914] A.C. 569, at p. 576; 16 D.L.R. 168, at p. 171.

46. Reference should be made to the discussion of this matter at pp. 402-4.

47. See *Bennett v. Imperial Oil Ltd.* (1960), 46 M.P.R. 50; 28 D.L.R. 2(d) 55.

48. *Brown v. Town of Morden* (1958), 24 W.W.R. 200; *Portage la Prairie v. B.C. Pea Growers, Ltd.* (1966), 54 W.W.R. 477 (Sup. Ct. Can.) *Paramuschuk v. Meadow Lake* (1967), 47 D.L.R. (2d) 427; *Roberts v. City of Portage la Prairie* (1968), 2 D.L.R. (3d) 373; aff'd. (1969), 6 D.L.R. (3d) 96.

interference with the complainant's use and enjoyment of materials underlying his land.⁴⁹ For example, in *Borys v. C.P.R.*,⁵⁰ where the lawful extraction of reserved petroleum involved a depletion of the owner's natural gas, Parlee J.A. said:

From these authorities these conclusions follow, that the reservation of the petroleum in the grant of the land enables the appellants to use all reasonable means to extract the petroleum from the earth; the gas in the earth may be likened to subterranean waters and they are subject to like principles of law.

In my opinion, the defendants are entitled to extract all the petroleum from the earth, even if there is interference with and a wastage of the plaintiff's gas, so long as in the operations modern methods are adopted and reasonably used and the provisions of the relevant statute and regulations are observed which, of course, must be observed.⁵¹

It would seem that pollution would be an interference falling within this general principle, so that where the pollution of ground water is a necessary or inevitable consequence of an activity lawfully being carried on, no cause of action arises. Where, however, pollution may be abated by taking reasonable steps, a failure to take such steps will give a cause of action to the injured landowner.

LIABILITY FOR THE ESCAPE OF GROUND WATER BROUGHT TO THE SURFACE

Once ground water is captured and brought to the surface, liability will attach for its escape, if that escape causes injury to adjoining lands. The problems are discussed in connection with surface water.⁵²

PROBLEMS RELATED TO UNDERGROUND STORAGE IN NATURAL RESERVOIRS

As attention is presently being focused on the prospects of utilizing natural cavities beneath the surface of the earth for storing water, it is essential to realize that such projects will inevitably raise difficult legal problems, the solutions to which are little assisted by direct legal precedents. Some of these problems will be mentioned in this section, and reference will be made to possible approaches that may be taken to their solution.

Water that has been reduced into possession by a landholder exercising his right of appropriation, and subsequently pumped into an underground storage basin, cannot be treated as ground water in the normal usage of the term merely because the water happens to be located beneath the surface. Adopting the fundamental principles of the law relating to possession, it would seem that the water is the property of the party who has pumped the water into the reservoir and remains in a position to exercise control over its withdrawal and usage. At the same time, however, water that escapes through seepage or percolation, so as no longer to be subject to the control of the party employing the reservoir, would probably cease to be his property and could freely be appropriated by some other landholder in the normal exercise of his rights respecting ground water.

49. See *Ballacorkish Silver, Lead and Copper Mining, Co., Ltd. v. Harrison* (1873), L.R. 5 P.C. App. Cas. 49, where mining operations caused a depletion of ground water in the wells of the lessor. See also, *Ohio Oil Co. v. Indiana* (1899), 177 U.S. 190; *Butterley Co., Ltd. v. New Hucknall Colliery Co., Ltd.*, [1909] 1 Ch. 37; aff'd [1910] A.C. 381.

50. [1952] 3 D.L.R. 218.

51. *Ibid.*, at p. 237.

52. See pp. 398-402.

Difficult problems are posed by the fact that, in many instances, the natural confines of a storage reservoir may be such as to underlie property of other landholders. Inasmuch as the stored water can be considered to be the property of the person maintaining control over it, an overlying landholder has no right to sink a shaft to tap the reservoir. The mere fact that the water lies beneath the surface of his land does not give him a right to appropriate it. The water has already acquired a property status and any interference would constitute an infringement of a property right. It is easy to see that in many cases this may amount to a serious interference with the normal rights of an overlying landholder. He has a right to drill for water on his land; yet the circumstances may be such as to prevent the exercise of this right. For instance, if the water table were to underlie the storage reservoir, a landholder might be prevented from drilling to it owing to the fact that in so doing he would be interfering with the water in the storage reservoir. Another problem arises where the storage basin has previously formed a natural reservoir for water percolating through the soil, and has supplied the overlying landholder with water for a lengthy period. The question arises whether the landholder would be entitled to pump water to the extent of the natural percolation into the basin. This in turn raises the difficult problem of ascertaining what percentage of the volume is represented by water flowing through natural forces, and what percentage is represented by water pumped into the reservoir for storage.

It seems fair to suggest that while a landholder may be forced to submit to encroachments on what was once considered to be his territorial domain, he is entitled to compensation for injuries caused to him by such interferences. At one time a man was considered to own not only the surface of his land but also the soil beneath the surface to the core of the earth, and the airspace above his property to the heavens. The public interest in air transport has forced a modification of the presumption with respect to airspace; a landholder cannot complain of a reasonable interference with his airspace by machines engaged in air transit. A similar approach might be taken with respect to the soil underlying the surface. It is perhaps arguable that where the public interest demands that subterranean cavities be employed for water storage for the benefit of the general community, a landholder ought not to be permitted to complain that the storage of water beneath his land amounts to a trespass, except insofar as some interest of his is being prejudiced thereby. If subterranean storage prejudices his interest in obtaining water for purposes relating to the use of his land, possibly he should be compensated to the extent that his interest is prejudiced. If it prejudices a legitimate interest in mining his land, he should perhaps be compensated. If it prejudices a legitimate surface activity, he should be compensated. But beyond that point it is difficult to predict that an overlying landholder would be seen by a court to have a right to be compensated merely because water is stored beneath the surface of his land.

CONCLUSION

Precision in the analysis and solution of hypothetical legal problems with respect to ground water is hindered considerably by a noticeable absence of judicial authority in the Canadian provinces during this century. It is, accordingly, difficult to predict how courts might react to these problems if raised in litigation. It would seem that a new emphasis on the importance of ground water in satisfying basic industrial and domestic needs may stimulate a more pragmatic judicial approach to the solution of problems. In truth, the present law was developed out of a pragmatic approach, but in response to somewhat different problems in a different era. Experience has shown, especially in some of the more arid regions of the United States, that as dependencies upon water resources become more acute, the basic common law provisions must be modified by more responsive judicial and legislative approaches in order to accommodate the more sophisticated problems that arise. Seemingly, all contemporaneous ground water problems arising in the Atlantic Provinces must be approached with present needs in mind; predictability is lacking essentially for this reason.

CHAPTER TWENTY

Interaction of Common Law and Statutes Respecting Surface and Ground Water

By Alan D. Reid

INTRODUCTION

To a large extent, utilization of and interference with surface and ground water resources is brought about under statutory direction. The accumulation of water in reservoirs and its redistribution by corporate bodies, municipal and otherwise, is in most cases dependent upon legislative authority. Most municipalities have statutory powers to encroach upon water supplies for domestic and industrial needs, for fire protection and for sewage disposal,¹ and power to dispose of water in such a way as to affect the exercise of private rights. For example, the power to drain highways may result in interferences with the usage of land along boundaries of the highway.

A problem which must be considered is the extent to which statutory authorization may legitimize interferences with the use, by private landholders, of existing surface and ground water resources or with the use of land, where the interferences are caused in the course of the achievement of legislative objectives. The problems involved are of considerable complexity; all that will be attempted here will be to give a surface appraisal of the general approaches taken, in order to give some perspective to the interaction of statute law and common law relating to the utilization of surface and ground waters.

It should, perhaps, be emphasized that the principles outlined below are related to the matter of water resource development in at least two ways. First, they define a basis for examining the scope of powers which are conferred upon public bodies engaged in water resource development, and relate to the question how far such bodies may encroach upon private rights in the course of the accomplishment of legislative objectives. Second, the principles define the basis for recourse by public bodies, engaged in water resource development, against individuals, corporations and other public bodies carrying on activities (for example, mining, manufacturing and sewage disposal) which might conflict with water resource development through the unwarranted utilization of water, or through the introduction of deleterious substances into water supplies. Interferences such as these, emanating from the broad industrial base of our society, will similarly depend for their validity on statutory authorization conferred by the legislature.

1. These powers are discussed at pp. 107-17, 128-34, 149-54, 169-77.

CREATING A NUISANCE IN THE COURSE OF EXERCISING STATUTORY POWERS

Schemes for surface and ground water resource development and utilization will, in some cases, involve what would ordinarily be deemed to be nuisances, very generally defined as actionable interferences with the use and enjoyment of property. The accumulation of surface and ground water may entail, for example, widespread flooding of land and widespread diversion of surface water flows across private property.

The initial premise in determining whether liability arises in respect of such nuisances is that a statutory body may exercise only those powers specifically set out in the authorizing statute, or powers necessarily incidental to such powers.² In the exercise of such powers, however, a body may proceed without regard to the fact that the end, or the means taken to a particular end, may in some way encroach on what would otherwise be deemed to be private rights. As is stated in *Salmond on Torts*:

When a statute specially authorises a certain act to be done by a certain person, which would otherwise be unlawful and actionable, no action will lie at the suit of any person for the doing of that act. For such a statutory authority is also a statutory indemnity, taking away all legal remedies provided by the law of torts for persons injuriously affected.³

For example, it has been held that a general authority to build and repair highways is sufficient authority for a municipality to raise a road bed, or to construct ditches to protect the road from surface water, notwithstanding that this may amount to an obstruction of the normal flow of surface water.⁴ On the other hand, general authority to drain public property normally will not entail a right to dump the water on private property.⁵ Nor does it justify negligent performance.⁶ Care must be taken, as well, to ensure that the exercise of the power is not conditioned upon obtaining the approval of a water authority.

An initial classification to make in assessing statutory authorization is whether the authority is mandatory or permissive, or, in other words, absolute or conditional. Where a power is mandatory or absolute the body has a duty to exercise it, and if, in the exercise of such a right, private property is affected, no claim lies unless negligence can be established in the exercise of the power. Where, however, the power is merely permissive or conditional, it is not sufficient for the body merely to allege that it has exercised its power without negligence; it must go

2. *Groat v. City of Edmonton*, [1928] S.C.R. 522; *Township of Nelson v. Stoneham* (1957), 7 D.L.R. (2d) 39.

3. *Salmond on Torts* (London, 1965), 14th ed., p. 62. See also: *Hammersmith and City Railway Co. v. Brand* (1869), L.R. 4 H.L. 171; *Manchester v. Farnworth*, [1930] A.C. 171; *Smith v. Campbellford, Lake Ontario and Western Ry. Co.*, [1936] O.W.N. 649; *J. P. Porter Co., Ltd. v. Bell* (1954), 35 M.P.R. 13; *Downs v. William Jacobs Ltd.* (1962), 47 M.P.R. 367.

4. *Darby v. Crowland* (1876), 38 U.C.Q.B. 338; *Harrison v. Harrison* (1883), 16 N.S.R. 338; *Baskerville v. Franklin* (1906), 3 W.L.R. 547; *Meier v. Franklin*, [1927] 2 D.L.R. 294; *Stoneman v. Halifax*, [1936] 2 D.L.R. 504; *Sigurdson v. Rural Municipality of Argyle* (1956), 63 Man. R. 517; *Boras v. Lethbridge* (1956), 19 W.W.R. 456 (Alta.); *Shepherd v. Rural Municipality of Rockwood* (1958), 66 Man. R. 425; *Tomchak v. Rural Municipality of Ste. Anne* (1962), 33 D.L.R. (2d) 481; *Lee v. Rural Municipality of Arthur* (1965), 52 D.L.R. (2d) 263.

5. *Paisley v. Local Improvement District No. 399*, [1921] 3 W.W.R. 861; 63 D.L.R. 242.

6. See, for example, *Blake v. Douglas* (1853), 3 Nfld. L.R. 396; *Jennison v. East Hants* (1885), 18 N.S.R. 71; *Foster v. Lansdowne* (1899), 12 Man. R. 416; *Stott v. North Norfolk* (1914), 26 W.L.R. 774; 16 D.L.R. 48; *Hemphill v. McKinney* (1915), 27 D.L.R. 345; *Eakins v. Shaunavon* (1918), 42 D.L.R. 473.

further and establish that in accomplishing its objective it was necessary to create the particular interference complained of.⁷ The distinction is articulated in the Nova Scotia case of *Turpin v. Halifax-Dartmouth Bridge Commission*,⁸ where the commission had "power to construct, maintain and operate a bridge". The commission sought to use this authority to absolve itself from liability in respect of damage caused to underlying property by the use of salt to melt ice on the bridge, Doull J. classed the authority as permissive, and conditional upon using all available means to obviate injury to private persons. He said:

It is, however, necessary to distinguish between absolute and conditional statutory authority. When the authority is imperative and not merely permissive, where an authority not merely authorizes, but directs a thing to be done, then it may be done regardless of any nuisance that necessarily flows from it. An authority which is merely permissive, on the other hand, is *prima facie* conditional only; for the legislation will not be deemed, in the absence of special reasons for so holding, to have been intended to take away the rights of private persons without compensation. The burden of proof lies upon those who seek to show that a statute is intended to be imperative, for to take away the private rights of individuals without compensation will not lightly be imputed to the Legislature...⁹

It seems that the general tendency of courts is to interpret statutory authority as permissive, where at all possible, so as to require full regard for the private rights of individuals.¹⁰ Even where the statute provides for compensation, the authority may nonetheless be classed as permissive only; provision for compensation does not necessarily give a mandate to the authority to interfere with private rights upon mere pain of paying compensation for the interference. For instance, in *Skanes v. The Town Council of Wabana and Vokey*,¹¹ the Town Council drained a road across one owner's land, with his permission, and ultimately onto the plaintiff's land. It was held that the municipality was not able to claim immunity from liability merely because the statute authorized it to make drains and to enter upon private property, while paying compensation for injuries. Such authority is not to be exercised unless it is clear that the other powers given by the legislature cannot otherwise be reasonably and efficiently exercised.¹²

The general principle calling for a full acknowledgment of the rights of private individuals is illustrated by the leading case of *Geddis v. Proprietors of the*

7. See *The Rural Municipality of Monet No. 257 v. Campbell*, [1956] S.C.R. 763, where a municipality was held liable for damages arising from the diversion of surface water by constructing a road without obtaining the necessary authority under the Water Rights Act, R.S.S. 1940, c. 41. See also *Dyke v. Rosetown* (1956), 20 W.W.R. 1.

8. (1960), 44 M.P.R. 151. See also, *Metropolitan Asylum District v. Hill* (1881), 6 A.C. 193; *C.P.R. v. Parke* [1899] A.C. 535; *Lethbridge Northern Irrigation District v. Maunsell*, [1926] S.C.R. 603; *J. P. Porter Co., Ltd. v. Bell* (1954), 35 M.P.R. 13.

9. (1960), 44 M.P.R. 151, at p. 155.

10. There has been some suggestion that, in determining whether a statute is mandatory or permissive, regard is to be had to the reason for creating the particular statutory body. If created for a public purpose, there is an argument for saying that the legislature could not have intended liability in tort to arise out of something done without negligence pursuant to the authority; whereas if the body has been created primarily for financial gain, it is reasonable to suppose that the legislature intended the exercise of power to be conditional upon liability for unnecessary though, in a broad sense, authorized interferences with rights of third parties: see *Lethbridge Northern Irrigation District v. Maunsell*, [1926] S.C.R. 603, at p. 617, *per* Idington J. (dissenting).

11. (1958), 40 M.P.R. 274.

12. See also, *Imperial Varnish & Colour Co., Ltd. v. Toronto*, [1927] 2 D.L.R. 860.

Bann Reservoir.¹³ There the defendants were given statutory power to provide proper reservoirs for the impounding of water in times of flooding and in rainy seasons, so as to maintain an adequate river level for the propulsion of machinery. Through neglecting to cleanse the channel of a connected river, the river overflowed. The defendants sought to immunize themselves from liability by invoking the statute which set out their powers. In rejecting the defence, Lord Hatherly said:

I apprehend, that the true construction of all such powers given to companies is this: You *may* carry out your work to its full extent, and in some cases you *must* carry it out to its fullest extent, in the manner provided by the Act, but in so doing you shall not create any needless injury—you shall use all those precautions against injury to others which you would use against injury to yourselves in carrying on a similar work, and if we find that in carrying out your powers damage has been done by you, the law will say that the powers which you can exercise will be exercised for the prevention of mischief.¹⁴

Along the same lines, Lord Selborne said:

Farther, it appears to me to be clear that if, by this Act of Parliament, power is given to the Defendants to convey by this particular channel to the River *Bann*, a supply of water which would not otherwise in the same manner naturally pass down that channel, and to do all things proper and necessary for the conveyance and regulation of such supply of water, that power does not enable or authorize them to flood the lands of the neighbouring proprietors, unless it would be impossible to avoid or prevent such flooding by any reasonable and proper use of their statutory powers.¹⁵

Another early leading authority on point is *Canadian Pacific Railway Company v. Parke*¹⁶ where defendants were authorized by statute to irrigate their lands by diverting water from any adjacent stream, lake or river, and by conveying it over lands that did not belong to them. Instead of draining off surplus water brought onto their lands, the defendants allowed the water to mix with the subsoil causing a landslide that damaged the plaintiff's railway lines. Lord Watson viewed the statutory powers as permissive, allowing the defendants to use the water for irrigation, but requiring them to carry off the excess water so as to prevent damage to adjoining lands.

A recent Canadian case employing the same principle is *Portage la Prairie v. B.C. Pea Growers Ltd.*,¹⁷ where the plaintiff operated a seed cleaning mill and farm lying north of land occupied by the appellant municipality, upon which a sewage lagoon had been constructed under statutory authority. Effluent had seeped from the lagoon onto the plaintiff's land, damaging his crops and flooding his mill. The plaintiff claimed that this amounted to a nuisance. The defendant, however, contended that the seepage was necessarily incidental to the operation of the lagoon, which had been authorized by statute, and, accordingly, was not actionable. Resolving the issue in favor of the plaintiff, Martland J., in the Supreme Court of Canada, pointed out that while the city charter had authorized the

13. (1878), 3 A.C. 430. See also, *Brodie v. The King*, [1946] Ex. C.R. 283, dealing with the powers of the Canadian Lake of the Woods Control Board to regulate and control the level of the waters in the lake.

14. (1878), 3 A.C. 430, at p. 450.

15. *Ibid.*, at p. 452.

16. [1899] A.C. 535 (P.C. from British Columbia). This case was considered in *Irving Oil Co. Ltd. v. Rover Shipping Co. Ltd.* (1955), 45 M.P.R. 311, holding that while a wharf approved under the Navigable Waters Protection Act may be built so as to interfere with navigation, the authorization does not extend to permitting a vessel berthed at such wharf to obstruct another vessel from proceeding down the channel to unload at another wharf.

17. (1966), 54 W.W.R. 477.

building and maintenance of the lagoon, no direction was given to adopt any particular means of sewage disposal; nor was the city expressly or implicitly authorized to create a nuisance. Therefore the seepage constituted a nuisance from which the plaintiff could claim relief.

In summary, the practical application of the general principle is largely dependent upon the response to four questions which have been judicially put:¹⁸ Was the act causing the injury authorized by statute? Did the statute contemplate that the exercise of the power might cause injury to third parties? Is the injury caused an injury of the type contemplated by the statute? Does the statute provide for compensation for an injury such as that inflicted? The matter of compensation is especially important inasmuch as it is quite common for statutes to provide for compensation to affected individuals. Where this is done, normally the only remedy available to a complainant is the statutory relief. This point was made clear by Lord MacNaghten in *Corporation of Raleigh v. Williams*,¹⁹ where a drain was constructed under statutory authority, resulting in interference with adjoining land-holders. He said:

It appears that the Bell drain was constructed under a by-law duly passed. It was therefore constructed under the statutory powers of the municipality, and not the less so because it has in the result injuriously affected the lands of the plaintiffs. The statute itself clearly contemplates that a drainage work which benefits certain lands may injuriously affect others. For any damage "necessarily resulting" from the exercise of the statutory powers of the municipality (sect. 483), and for any damage done to the plaintiffs' property "in the construction of drainage works or consequent thereon" (sect. 591), the plaintiffs must seek their remedy by arbitration.²⁰

Yet, while a complainant is restricted to his statutory remedy where one is provided, care must be taken to ensure that the statute does in fact purport to provide a remedy for the specific injury in question. In some cases, for instance, the remedy is intended merely to compensate a person for injuries legitimately and necessarily inflicted by the proper exercise of the authority, but does not purport to preclude a complainant from pursuing his normal remedy in tort where he can establish negligence in the exercise of the statutory powers.²¹ The presence of an additional factor such as this may well vary the general principle set out in *Corporation of Raleigh v. Williams*.

18. These questions were put by Jenkins L.J. in *Marriage v. East Norfolk Rivers Catchment Board*, [1950] 1 K.B. 284, at pp. 305-6, and approved by Martland J. of the Supreme Court of Canada in *Corp. of the District of North Vancouver v. McKenzie Barge and Marine Ways Ltd.* (1965), 51 W.W.R. 193.

19. [1893] A.C. 540. See also, *Romanica v. Greater Winnipeg Water District* (1921), 60 D.L.R. 58.

20. [1893] A.C. 540, at p. 550.

21. See, for example, *Pelletier v. Rural Municipality of Springfield*, [1924] 4 D.L.R. 1158, where it was argued that the plaintiff, whose lands had been injured by a diversion of surface water, could not claim compensation for the injury as he had not filed his claim within the one year period prescribed by statute. It was held, however, that as negligence was the basis of the claim, it could be maintained beyond the prescribed period, which was not intended to cover claims of this nature. But see *Corp. of the District of North Vancouver v. McKenzie Barge and Marine Ways Ltd.* (1965), 51 W.W.R. 193 (Sup. Ct. Can.) where a provision barring an action arising out of the construction of a ditch authorized by statute was held *not* to be limited to preventing legal action only in cases where there was neither negligence nor common law nuisance. The purport of the section was to restrict a complainant to compensation, which was provided for under yet another section of the statute. This case was subsequently distinguished, however, in *Portage la Prairie v. B.C. Pea Growers Ltd.* (1966), 54 W.W.R. 477 (Sup. Ct. Can.), and in *Klimenko v. Winnipeg* (1965), 55 W.W.R. 180.

INFLICTING INJURY THROUGH THE FAILURE TO REPAIR STRUCTURES ERECTED UNDER STATUTORY AUTHORITY

Thus far the problems considered have related to situations where a particular activity has been authorized by statute, and, during the course of the authorized operation, interferences have been caused to neighbouring properties. Further problems arise, however, where an operation has been completed under statutory authority, for example, where a street has been constructed, or a sewer laid, without negligence and in such a way as not to create an inherent nuisance, yet injury is subsequently incurred by private interests owing to the fact that the structure has fallen out of repair. The questions arise, first, whether a civil action for damages can be brought by a person suffering injury as a consequence of a breach of a duty to repair imposed by the legislature, and, second, whether there is a common law duty to repair such structures, the failure of which will give rise to an action for damages.

Of significance here is the somewhat difficult distinction between, on the one hand, what has been termed misfeasance, the careless or improper carrying out of an undertaking, which will normally give rise to liability in the absence of a provision immunizing the public body, and, on the other, what has been termed non-feasance, an omission to do something which ought to have been done. For example, if a duty to repair a drain is imposed upon a public body and the drain is repaired improperly in such a way as to inflict injury on an adjacent property, it amounts to misfeasance and is actionable. But where the authority neglects to repair the drain, it may be classed as non-feasance. While non-feasance in the face of a duty to act will normally give rise to a cause of action at common law, where the non-feasance is that of a public authority, difficulties have arisen.

A number of early cases, dealing with injuries incurred by reason of the failure of municipalities to repair highways, enunciated the doctrine that at common law no liability attaches in respect of injury resulting from the non-repair of highways, and that a public authority will not be liable for non-feasance except where the legislature has imposed liability upon the body in respect of the particular injury incurred.²² It is clear, however, from the Supreme Court of Canada decision in *City of Vancouver v. McPhalen*,²³ that liability will be imposed in respect of an injury caused by the non-repair of a highway in cases where, even though the statute may not expressly impose liability, this is the only fair inference to be drawn from the statute as a whole. The earlier cases were distinguished on the ground that a duty to repair had not been directly imposed upon the public body by the legislature. Where such a duty is imposed, and the means for carrying out the duty is authorized, there is a shifting of the onus of proof, and liability for non-feasance will be presumed to lie unless it is possible to infer from the statute that no such right of action was contemplated by the legislature. Such an inference of non-liability, however, may well be drawn from the statute;

22. *Municipality of Pictou v. Geldert*, [1893] A.C. 524 (P.C. from Nova Scotia); *The City of Saint John v. Campbell* (1896), 26 S.C.R. 1; rev'g 33 N.B.R. 131; *Thomas v. Town of Annapolis* (1896), 28 N.S.R. 551; *McCrea v. The City of Saint John* (1903), 36 N.B.R. 144.

23. (1911), 45 S.C.R. 194.

it was, in fact, drawn in a later case before the Supreme Court,²⁴ where a statutory duty imposed on a municipality to repair highway ditches was held not to extend to benefit a plaintiff whose land was flooded through failure of a clogged ditch to effectively drain the land. As the statutory duty was considered to have been imposed to provide for the drainage of the road, and not to benefit adjacent lands, the inference was drawn that the legislature did not intend that the plaintiff should be entitled to claim damages. In other cases, however, such an inference has been rejected, and the direct imposition of a duty to repair has been held to ground liability in the face of non-feasance.²⁵ Close scrutiny of the particular statute, therefore, is imperative.

In other cases, liability for a failure to repair has been placed squarely on a common law basis. For example, in the Nova Scotia case of *Peddle v. The City of Sydney*,²⁶ where the plaintiff was injured owing to the dangerous condition of a manhole cover on a sidewalk, Doull J. imposed liability on the basis of an implicit duty to prevent an artificial structure (as contrasted with a highway), which was not inherently a nuisance, from becoming one through subsequent neglect. He distinguished the common law position with regard to highways as an anomalous exception to a general proposition that liability normally attaches to a public body which inflicts injury through the neglect of a potential nuisance. Holding the city liable for injuries arising out of the non-repair of the manhole cover, he said:

...sewers and structures in connection with them have been held in various cases not to be a part of the highway but artificial structures. The law in regard to these has proceeded on a different line and in some cases where the two principles almost clash, the distinction is a very narrow one. Assuming the artificial structure to be lawfully erected, the authority which places it on the highway is under a duty to keep it so that it does not become a nuisance by getting out of repair.²⁷

In adopting this line of reasoning, it may be arguable that the distinction between misfeasance and non-feasance is purely artificial and ought to be ignored.

24. *Pierce v. Rural Municipality of Winchester*, [1931] S.C.R. 628. See also, *Wilkinson v. Rural Municipality of St. Andrews*, [1923] 3 W.W.R. 961.

25. See, for example, *Maytag v. Hanover*, [1932] 2 D.L.R. 208, where the Supreme Court of Canada held that certain sections of the Manitoba Land Drainage Act imposed upon the municipality a duty to maintain ditches for the benefit of landowners of the drainage district; non-feasance in the face of this duty rendered the municipality liable in damages. Also, *Johnson v. Lakeview*, [1924] 3 W.W.R. 505; 4 D.L.R. 927. But see *Audette v. Rural Municipality of de Salaberry* (1955), 16 W.W.R. 429 for an example of a situation where a statute explicitly takes away liability for neglect.

26. (1939), 14 M.P.R. 177.

27. *Ibid.*, at p. 187. See also, *The Borough of Bathurst v. MacPerson* (1879), 4 A.C. 256, where the municipality constructed a barrel drain which was allowed to fall out of repair causing a hole to develop in the street. The defendant municipality was held liable even though there was no statutory duty to repair roads. Sir Barnes Peacock noted that the hole had been caused by an artificial work, and that under the circumstances a duty at common law arose to keep the drain in such a state as to prevent injury to passengers on the highway. This case supports the distinction drawn by Doull J. in *Peddle v. The City of Sydney* (1939), 14 M.P.R. 177, with respect to artificial structures. The *Bathurst* case has elsewhere been explained, however, as an example of misfeasance. The Privy Council in *Pictou v. Geldert*, [1893] A.C. 524, in rejecting the argument that there was a statutory duty to repair roads, distinguished the *Bathurst* case as involving a situation where a nuisance was created, suggesting that there is a duty to prevent a public work from becoming a nuisance, the failure to perform which constitutes misfeasance and is actionable. This explanation was also advanced in *Municipal Council of Sydney v. Bourke*, [1895] A.C. 433.

And, in *Sowles v. Surrey Municipality*,²⁸ where the plaintiff's automobile was damaged when it ran into a crack in the roadway caused by the collapse of a culvert, O'Halloran J. suggested it was of little significance. He said:

When a public authority has made an artificial work to accommodate the necessities or conveniences of the inhabitants, it is liable at common law (unless clearly exempted by statute), if it negligently allows the work to become dangerous for use. In other words, having lawfully put the work in place, it is bound to exercise due care to prevent it becoming a source of danger to those lawfully using it who take reasonable precautions for their own safety.

If this is a correct statement of principle, then I think it matters little whether or not it fits into some verbal category labelled misfeasance or non-feasance. These terms, confusing at best, I am inclined to believe have outlived their usefulness, certainly concerning any distinction between acts of commission and omission.²⁹

Other judges, however, have preferred to recognize the distinction, but to permit recovery by classing a failure of a body to repair as misfeasance, rather than non-feasance, in cases where the injury is inflicted as a result of the deterioration of the structure into a dangerous state. This was the approach taken by Smily J. in *Peddle v. The City of Sydney*, and also seems to be the basis of the decision of the New Brunswick Court of Appeal in *Curless v. The Town of Grand Falls*.³⁰ There the problem was raised as to the liability of the town for a failure to repair a clogged sewer after the plaintiff had given notice of the obstruction. The evidence disclosed that the sewer had been properly constructed but had not been properly maintained. Hanington J. held that there is a duty placed upon a municipality to keep a potential nuisance from becoming an actual nuisance once its attention has been drawn to it; the breach of this duty gives rise to liability. McLeod J. classed the case as a simple instance of misfeasance, and adopted a similar approach in the subsequent case of *McKay v. The City of Saint John*,³¹ where the plaintiff brought action against the city for damages caused by water escaping from the defendant's sewer. He said:

The case is within the principle decided by this court in *Curless v. The Town of Grand Falls*. It is not a case of mere non-feasance on the part of the city. The city made the sewer, and it was its duty to repair it if it got out of repair, and its attention was called to it. The sewer did get out of repair, and the city was notified, but neglected to repair it; the damage is the result of its neglect, and it is liable to the plaintiff. . . .³²

CONCLUSION

In summary, in every case where injury is inflicted through the action or inaction of a body exercising statutory powers, or where a public body is contemplating a course of action that may inflict injury on private individuals, it is essential to look first to the exact provisions of the statute in question. Where the complainant is in a position to allege that the exercise of a statutory power by a body amounts to a nuisance, the relevant issue is whether the statute has not only

28. [1952] 1 D.L.R. 648. See also, Idington J. in *Vancouver v. McPhalen* (1911), 45 S.C.R. 194, at pp. 207-8, where he suggested that, in dealing with the issue of a failure to perform a statutory duty, the distinction between misfeasance and non-feasance ought to be abandoned.

29. [1952] 1 D.L.R. 648, at p. 649.

30. (1905), 37 N.B.R. 227. See also, *Sowles v. Surrey Municipality*, [1952] 1 D.L.R. 648, per Robertson J. A.

31. (1908), 38 N.B.R. 393.

32. *Ibid.*, at p. 394.

authorized, but implicitly immunized, the body in respect of nuisance by placing an absolute duty or right on it to do that which it is carrying on, or whether the statute has only permitted it to carry on an activity on condition that it do so in such a way as to avoid unnecessary interferences with private rights.

Where, however, the authorized activity does not in itself constitute a nuisance to adjacent lands, but an interference is subsequently occasioned owing to a failure by the body to take certain steps that are necessary if injury is to be obviated, the issue is simply whether the legislative intention, as gleaned from the statute authorizing the work, was to relieve the body from liability for injury subsequently inflicted; where a statutory duty to repair has been neglected, or a common law duty ignored, liability will normally lie in the absence of a contrary intention manifest in the legislation.

CHAPTER TWENTY-ONE

Statutes Respecting Surface and Ground Water*

FEDERAL STATUTES

Use and General Control

Generally speaking, jurisdiction over surface and ground water rests with the provinces, not the federal Parliament. Apart from exercising general control over waters located on lands subject to its jurisdiction, as, for instance, Indian lands,¹ national parks,² lands subject to the Dominion Water Power Act,³ and waters falling within the general jurisdiction of the Minister of Energy, Mines and Resources,⁴ the federal government exercises no direct control over surface and ground water within the provinces.

Certain federal statutes do, however, affect the use of surface and ground water, insofar as they authorize interferences with private rights in the course of undertakings within the legislative competence of the federal government. For example, under the Expropriation Act,⁵ a Minister in charge of the construction and maintenance of a public work may after giving notice enter upon private land where necessary for any purpose related to a public work,⁶ and may alter roads⁷ and drains⁸ which may have the effect of altering the natural drainage characteristics of a particular area.

Of importance, as well, is the Railway Act,⁹ under which a railway company may enter upon and take lands necessary for a railway undertaking,¹⁰ and may alter the natural drainage characteristics of an area, thereby affecting the use of surface water by owners of adjacent land. A company may also arrange to convey across intervening property water that is necessary in the construction, maintenance or operation of the railway.¹¹ A duty is placed on railway companies, in order to insure that a minimum of damage is occasioned by such activity, to provide outlets and to restore drains so as to prevent water from backing up and

*The federal, New Brunswick and Prince Edward Island material was written by Alan D. Reid; the Nova Scotia material, by a team under W.A. MacKay, revised by G.V. La Forest and Lucille Kerr; the Newfoundland material by G.V. La Forest and W.R. Charles.

1. Indian Act, R.S.C., 1970, c. I-6.

2. National Parks Act, R.S.C., 1970, c. N-13.

3. R.S.C., 1970, c. W-6.

4. Government Organization Act, 1966, (1966-67), 14 & 15 Eliz. II, c. 25, s. 29 (Can.). [See now the jurisdiction of the Minister of the Environment, discussed in the Addendum, at p. 483.]

5. R.S.C., 1970, 1st Supp., c. 16.

6. *Ibid.*, s. 37(a).

7. *Ibid.*, s. 37(e).

8. *Ibid.*, s. 37(f).

9. R.S.C., 1970, c. R-2.

10. *Ibid.*, s. 102(1).

11. *Ibid.*, s. 143(1).

flooding adjoining land.¹² In addition, they must pay compensation for injuries necessarily inflicted.¹³ A breach of such a duty by the railway would probably give a cause of action to the injured party for damages;¹⁴ it seems, however, that, as far as surface water is concerned, these duties only extend to the avoidance of nuisances such as flooding, rather than to the restoration of benefits which the natural drainage flow may have previously bestowed on landowners in the immediate vicinity.

Similar powers may be exercised by the Minister of Transport under the Government Railways Act,¹⁵ in respect of the construction, maintenance and operation of railways vested in Her Majesty, and those under the control of the Minister.¹⁶ This Act, however, does not impose as strict responsibilities upon the Minister in respect of the diversion and obstruction of surface water, as it does in respect of natural watercourses.¹⁷ On the other hand, the more detailed provisions of the Railway Act, outlined above, do apply to the Canadian National Railways, by virtue of the Canadian National Railways Act.¹⁸

Drainage

Certain federal statutes authorize the drainage of land through adjacent property. For example, by virtue of the Expropriation Act,¹⁹ the Minister of the department charged with the construction and maintenance of a public work may enter upon private property for the purpose of making proper drains to carry off the water from a public work and to keep such drains in repair,²⁰ and, further, may alter the position of any sewer or drain.²¹ Compensation for injury, if any, is provided for.²² Drains or ditches constructed through adjacent lands in order to drain the public work must be maintained by the owner or occupier of that land as if such ditches had always existed.²³

Under the Railway Act,²⁴ a railway company is empowered to construct drains to carry off surface water and to protect the roadbed from injuries from surface water flooding.²⁵ Care must be taken, however, to instal sufficient outlets to prevent the water from backing up and flooding adjacent land.²⁶ Provision is made as well for municipalities and landowners, prejudiced by inadequate drainage through railway property, and for a railway company desiring to construct drains through adjacent lands, to apply to the Canadian Transport Commissioners for an order that drains be constructed and for a determination of compensation to be paid either to or by the company.²⁷

12. *Ibid.*, ss. 103, 208.

13. *Ibid.*, s. 104.

14. *Ibid.*, s. 336.

15. R.S.C., 1970, c. G-11.

16. *Ibid.*, s. 4(1).

17. *Ibid.*, s. 5(1)(h).

18. R.S.C., 1970, c. C-10, s. 16.

19. R.S.C., 1970, 1st Supp., c. 16.

20. *Ibid.*, s. 37(d).

21. *Ibid.*, s. 37(f).

22. *Ibid.*, s. 40.

23. *Ibid.*, s. 38.

24. R.S.C., 1970, c. R-2.

25. *Ibid.*, s. 102(1)(m).

26. *Ibid.*, s. 208.

27. *Ibid.*, s. 209.

The Maritime Marshland Rehabilitation Act²⁸ provides that the Minister of Agriculture may involve himself in the construction of dykes, aboiteaux and breakwaters for the purpose of reclaiming and developing marshlands in the provinces of Nova Scotia, New Brunswick and Prince Edward Island.²⁹ The Governor in Council may establish Advisory Committees to advise the Minister as to undertakings under the Act.³⁰ Federal work or assistance is contingent upon a province undertaking the reconditioning and construction of complementary drainage facilities and the maintenance of the work after it has been completed.³¹

Pollution

A few federal statutes relate to pollution of surface and ground water. A general provision of the Criminal Code³² prohibits a person from committing a common nuisance so as to endanger the lives, safety or health of the public or to cause physical injury. A person commits a common nuisance by doing an unlawful act or failing to discharge a legal duty where the effect is to endanger the public or obstruct the public in enjoying a right common to all.³³ Presumably, then, the fouling of well water intended for beneficial use, or surface water accumulated in a reservoir, may amount to a common nuisance under the Code, provided the rather difficult element of *mens rea* can be attributed to the person polluting the water.³⁴

Two further statutes attempt to prevent the pollution of surface water insofar as it is a domain for fish and wildlife. Under the Fisheries Act,³⁵ it is an offence to deposit deleterious substances in any water frequented by fish,³⁶ which would include, possibly, a surface water reservoir stocked with fish. Certain deleterious substances are specifically mentioned in the section; to supplement this, a general power is given to the Governor in Council to declare any substance to be a deleterious substance.³⁷ The Governor in Council may also make regulations for carrying out the purposes of the Act, including regulations respecting the pollution of waters.³⁸ In addition, a regulation under the Migratory Birds Convention Act³⁹ makes it an offence to deposit or to permit the introduction of oil, oil wastes or other substances harmful to migratory waterfowl into waters frequented by these birds, which might possibly be surface water accumulations.

28. R.S.C., 1952, c. M-4.

29. *Ibid.*, s. 3.

30. *Ibid.*, ss. 4(a), 8.

31. *Ibid.*, s. 4(b).

32. R.S.C., 1970, c. C-34, s. 176(1).

33. *Ibid.*, s. 176(2).

34. For a general discussion of how *mens rea* relates to provincial anti-pollution legislation, and for insight into its applicability to analogous federal offences, see *R. v. Industrial Tankers Ltd.* (1968), 10 C.L.Q. 346, and cases cited therein.

35. R.S.C., 1970, c. F-14.

36. *Ibid.*, ss. 33(1)-(3). These sections have recently been strengthened by R.S.C., 1970, 1st Supp., c. 17, which makes it an offence to deposit deleterious substances of any type in any water frequented by fish, or in any place where waste might enter such water, and increases the maximum penalty for violation.

37. *Ibid.*, s. 33(11), as enacted by R.S.C., 1970, 1st Supp., c. 17.

38. R.S.C., 1970, c. F-14.

39. R.S.C., 1970, c. M-12; SOR/66-361, s. 51.

NEW BRUNSWICK STATUTES

Use and General Control

The right to the use and control of surface and ground water vests in the holder in fee of the land upon which the water is situated. By the Property Act,⁴⁰ a conveyance of land is deemed to include water and watercourses appertaining to the land,⁴¹ and carries with it sewers, gutters and drains,⁴² unless a contrary intention is expressed in the conveyance.⁴³ Within this general context, rights to surface and ground water may be exercised by the owner in accordance with the common law principles already outlined.⁴⁴ Insofar as these rights are transferred with the land by deed, however, the effectiveness of their transfer, like the effectiveness of the transfer of the land itself, may be affected by the provisions of the Community Planning Act.⁴⁵ Where a transaction involves the transfer of a portion of land, a subdivision necessarily occurs, and the validity of the transfer is dependent upon the approval and filing requirements of that Act.⁴⁶ Among these is the submission of a "Tentative Plan" showing water courses, drainage ditches and swamps within the land⁴⁷ and such contours and elevations as may be necessary to determine the grade of the highways and drainage of the land.⁴⁸

A municipal council is empowered to control by by-law the subdivision of land within the municipality and, by such by-law, may provide that no approval shall be given to a subdivision plan unless the owner has made satisfactory arrangements to instal, at his own expense, or to assist in installing, to the extent required by the by-law, culverts and drainage ditches, or, in the alternative, delivers to council a performance bond or pays a sum to provide such facilities.⁴⁹

While general rights to the use and control of surface and ground water pass with the property, there are a number of statutory provisions that cut down the rights of an owner in relation to water resources, and take away his legal right to complain about interferences.

Of considerable importance is the Water Act,⁵⁰ which constitutes the New Brunswick Water Authority,⁵¹ whose function is more fully described elsewhere in this work.⁵² This body is given control over the use of surface and ground water and the allocation of its use.⁵³ This provision establishes a basis for controlling the unwarranted disposal of the resource where circumstances demand preserving or sharing it for maximum benefit to persons in a position to use it. Unfortunately,

40. R.S.N.B., 1952, c. 177.

41. *Ibid.*, s. 21(1).

42. *Ibid.*, s. 21(2).

43. *Ibid.*, s. 21(3).

44. See Chapters Nineteen and Twenty.

45. (1960-1), 9 & 10 Eliz. II, c. 6 (N.B.).

46. *Ibid.*, s. 28(2), as enacted by (1963, 2nd Sess.), 12 Eliz. II, c. 13, s. 8 (N.B.), as amended by (1966), 15 Eliz. II, c. 152, s. 17 (N.B.).

47. *Ibid.*, s. 30(2)(f).

48. *Ibid.*, s. 30(2)(g).

49. *Ibid.*, s. 27(1)(j)(ii), as amended by (1966), 15 Eliz. II, c. 152, s. 17(c) (N.B.).

50. (1960-1), 9 & 10 Eliz. II c. 19 (N.B.). [For recent amendments, see the Addendum, at p. 496.]

51. *Ibid.*, s. 2(1), as enacted by (1969), 18 Eliz. II, c. 75, s. 1 (N.B.).

52. See Chapter Three, at pp. 92-4.

53. (1960-1), 9 & 10 Eliz. II, c. 19, ss. 4(a), (b) (N.B.). [See also the Clean Environment Act, discussed in the Addendum, at pp. 493-6.]

the vagueness of the provision and the total absence of criteria for control detract from this and may well affect the Authority's ability to vary established common law principles. On the other hand, the power vested in the Lieutenant-Governor in Council, under section 5(1) of the Act, to make regulations to carry out the provisions of the Act, may well be broad enough to enable a structure for the control of specified uses to be provided by regulation. To date, this has not been done; therefore, common law principles continue to apply to matters not specifically regulated by the Act.

A further basis for interferences with common law rights is provided by the Municipalities Act.⁵⁴ Cities, towns, and villages are empowered to provide services for the peace, order and good government of the municipality and for promoting the health, safety and welfare of the inhabitants. This includes, among other things, water supply.⁵⁵ Municipalities are given power to expropriate land for the purpose of carrying out their powers and providing services; procedures for this are set out in the Act.⁵⁶ The power of expropriation extends to lands outside the municipality, though not to lands within the boundaries of another municipality.⁵⁷ Lands containing large surface or ground water deposits could be expropriated under these provisions and, under common law rules, used for supply purposes.

A number of other statutes empower officials to perform acts that would otherwise constitute actionable interferences with private rights. For example, under the Highway Act⁵⁸ the Minister of Highways or his agents may take possession of land or water where necessary for the construction, maintenance or repair of a highway or for obtaining access thereto.⁵⁹ He may alter road levels in such a way as to interfere with the normal flow of surface water.⁶⁰ Compensation is provided for in the Act for injuries occasioned by the exercise of these powers.⁶¹ Under the Public Works Act,⁶² the Minister of Public Works or his agents may take possession of land or water that, in his opinion, is necessary for the construction, maintenance or repair of a public work or for obtaining access thereto,⁶³ and may alter the level of roads;⁶⁴ again, compensation is provided for by the Act. Under the Expropriation Act,⁶⁵ the Lieutenant-Governor in Council may expropriate land deemed necessary or desirable for carrying out public works or other public purposes, or for carrying out any work deemed to be in the public interest.⁶⁶ These sweeping powers would embrace the compulsory taking of surface or ground water lying within the land expropriated.

54. (1966), 15 Eliz. II, c. 20 (N.B.).

55. *Ibid.*, ss. 7(1),(2), First Schedule (k).

56. *Ibid.*, s. 8(1).

57. *Ibid.*, ss. 8(1),(2).

58. (1968), 17 Eliz. II, c. 5 (N.B.).

59. *Ibid.*, s. 21(b).

60. *Ibid.*, s. 21(e).

61. *Ibid.*, s. 22.

62. (1963 2nd Sess.), 12 Eliz. II, c. 10 (N.B.).

63. *Ibid.*, s. 8(b).

64. *Ibid.*, s. 8(e).

65. R.S.N.B., 1952, c. 77.

66. *Ibid.*, s. 2(1), as amended by (1955), 4 Eliz. II, c. 47, s. 1 (N.B.).

An owner of land may further be required to submit to interferences with surface and ground water under the provisions of the Mining Act.⁶⁷ In some cases mines and minerals have, in conveyances, been reserved to the Crown;⁶⁸ in addition, certain minerals are deemed to be reserved to the Crown.⁶⁹ These are capable of being worked under a mining lease or licence.⁷⁰ The holder of a licence is entitled to enter upon private land even though this may cause injury to the owner and may possibly interfere with surface and ground water deposits. He must, however, give a bond to indemnify the owner, lessee, or person interested in the land, for injuries caused by the mining operation, and, if the parties themselves cannot agree upon the amount of damages, provision is made in the Act for their assessment.⁷¹ Similar provisions obtain under the Oil and Natural Gas Act.⁷²

Drainage and Sewage

Municipalities are empowered under private legislation constituting municipal corporations⁷³ and under the Municipalities Act⁷⁴ to provide for the drainage of surface water within their boundaries, and for the discharge of sewage.⁷⁵ These powers are subject in turn to the provisions of the Water Act,⁷⁶ which requires a municipality contemplating the establishment or alteration of sewage works or a drainage diversion to submit plans and specifications for the approval of the Minister of Natural Resources.⁷⁷ Similar powers are vested in the Minister of Health and Welfare under the Health Act⁷⁸ where an existing system is of such a character as to be a menace to public health.⁷⁹ These provisions are discussed more fully in Chapter Three.

Drainage of highways is provided for in the Highway Act,⁸⁰ which gives the Minister of Highways or his agents authority to enter upon land to construct and repair drains to carry water off a highway.⁸¹ Provision is made for payment of compensation for injuries.⁸² The Act also makes it an offence to fill up or obstruct a ditch, water course or drain constructed for the purpose of draining water from a highway.

Similar powers are granted under the Public Works Act⁸³ to the Minister of Public Works to enter upon land to open and repair drains to carry off water from a public work.⁸⁴ Again, provision is made for payment of compensation.⁸⁵

67. (1961-2), 10 & 11 Eliz. II, c. 45 (N.B.).

68. *Ibid.*, s. 8(1).

69. *Ibid.*, s. 8(3).

70. *Ibid.*, ss. 9, 32.

71. *Ibid.*, s. 76(1).

72. R.S.N.B., 1952, c. 162, s. 20.

73. See, generally, Chapter Three.

74. (1966), 15 Eliz. II, c. 20 (N.B.).

75. *Ibid.*, ss. 7(1), (2), First Schedule (e).

76. (1960-1), 9 & 10 Eliz. II, c. 19 (N.B.).

77. *Ibid.*, ss. 9(1), 12. The construction or alteration of a sewage works requires the approval of the Minister of Health and Welfare under s. 8(1) of the Act. [Now the Minister of Health; see Addendum, p. 496].

78. R.S.N.B., 1952, c. 102. [Now the Minister of Health; see (1971), 20 Eliz. II, c. 31].

79. *Ibid.*, s. 20.

80. (1968), 17 Eliz. II, c. 5 (N.B.).

81. *Ibid.*, s. 21(d).

82. *Ibid.*, s. 22.

83. (1963 2nd Sess.), 12 Eliz. II, c. 10 (N.B.).

84. *Ibid.*, s. 8(d).

85. *Ibid.*, s. 10.

Under the Mining Act,⁸⁶ the holder of a mining licence may use part of the demised land for the purpose of opening drains, but must use the lands in a manner that will be least injurious to the owner or occupant.⁸⁷ If he requires a right of way or easement through adjoining land for the purpose of draining the mining area, but cannot reach an agreement with the owner or tenant, he may give notice in writing to the owner and tenant of his intention to apply to the Minister for leave to enter upon the land to lay out and maintain drains.⁸⁸ He may then petition the Minister for leave to proceed,⁸⁹ which the Minister may grant after hearing the owner.⁹⁰ The Minister may direct the laying out of drains and direct a district highway engineer or another engineer to lay out a right of way.⁹¹ Similar provision is made with respect to mining licensees who require that their mining areas be drained by means of aqueducts leading across or through adjoining lands.⁹²

The Drainage of Farm Lands Act⁹³ provides a legal basis for an owner of farm land to artificially drain water off his land through neighbouring property. Where conditions of necessity exist, an application may be made to the Minister of Agriculture and Rural Development for permission to construct a ditch through the property of an adjacent owner.⁹⁴ The Act provides that the Minister, or someone designated by him, may investigate the need for drainage, estimate the cost, determine the damage that will be caused, estimate the benefit of the drain to the applicant, seek to negotiate an agreement between the parties, construct the drain, and assess the applicant for the cost of construction.⁹⁵ The applicant may himself be authorized to construct the ditch upon depositing a compensatory sum with the Minister for the benefit of the owner.⁹⁶ Where the owner is dissatisfied with the Minister's award, he may appeal to the Land Compensation Board.⁹⁷

A legal basis by which marshland may be reclaimed and utilized for agricultural purposes is established under the Marshland Reclamation Act.⁹⁸ "Marshland" is defined as "land lying upon the sea coast or upon the bank of a tidal river and being below the level of the highest tide".⁹⁹ The Act creates the Marshland Reclamation Commission,¹⁰⁰ the function of which is to advise the Minister of Agriculture and Rural Development on matters related to the reclamation and protection of marshland and to study proposals for the construction and operation of works¹⁰¹ such as dykes, breakwaters, drains and dyke facilities for the development and improvement of marshlands.¹⁰² The Act is discussed in greater detail in

86. (1961-2), 10 & 11 Eliz. II, c. 45 (N.B.).

87. *Ibid.*, s. 75.

88. *Ibid.*, s. 94.

89. *Ibid.*, s. 95.

90. *Ibid.*, s. 97.

91. *Ibid.*

92. *Ibid.*, s. 100.

93. R.S.N.B., 1952, c. 65. [For recent amendments, see the Addendum, p. 497].

94. *Ibid.*, s. 1, as enacted by (1966), 15 Eliz. II, c. 50, s. 1 (N.B.).

95. *Ibid.*, s. 2, as enacted by (1966), 15 Eliz. II, c. 50, s. 2 (N.B.).

96. *Ibid.*, s. 3.

97. *Ibid.*, s. 5, as enacted by (1966), 15 Eliz. II, c. 50, s. 4 (N.B.).

98. R.S.N.B., 1952, c. 141.

99. *Ibid.*, s. 1(d).

100. *Ibid.*, s. 6.

101. *Ibid.*, s. 9.

102. *Ibid.*, s. 1(h).

Chapter Three. Over the years a number of other public and private Acts were passed for the reclamation of marshlands in New Brunswick through the establishment of commissions empowered to undertake projects and to recover costs through the assessment of marsh owners. Most of these provisions subsequently were consolidated in the Sewers and Marshlands Act,¹⁰³ which has since been repealed¹⁰⁴ in accordance with the general program for the redistribution of local and provincial powers effected in 1966.

Pollution

The major provisions for controlling the pollution of surface and ground water are contained in the Water Act.¹⁰⁵ Unless the approval of both the Minister of Natural Resources and the Minister of Health and Welfare is obtained, municipalities and persons are prohibited from discharging material of any kind into ground or surface water deposits or in any place where the consequence might be to cause the pollution or impairment of the quality of water employed for beneficial use.¹⁰⁶ A similar prohibition is set out in the regulations under the Act;¹⁰⁷ the regulations further empower the Minister of Municipal Affairs to order a municipality or person discharging effluent into a body of water to eliminate from the effluent as great a portion of the solids as, in the opinion of the Minister, may be feasible.¹⁰⁸ The Act also makes provision for the Authority to prescribe an area surrounding a source of public water supply, within which it shall be unlawful to discharge or deposit a potential pollutant, or to bathe or wash or do anything that may in any way impair the quality of the water.¹⁰⁹

Wide powers are conferred by the Health Act¹¹⁰ upon the Minister of Health and Welfare to take steps to prevent pollution from becoming a public health hazard. He is empowered to regulate the construction and maintenance of water supply systems, sewers, water closets, privies and other things potentially detrimental to public health.¹¹¹ He may make regulations to prevent, abate or remove nuisances,¹¹² which are defined to include pools, privies, urinals, cesspools, drains, wells, springs or other supplies.¹¹³ He may also make regulations to prevent the pollution of pools, springs, wells and waters¹¹⁴ and may make regulations affecting the fluoridation of water supplies.¹¹⁵ Regulations are currently in effect governing

103. R.S.N.B., 1952, c. 103.

104. (1966), 15 Eliz. II, c. 103, s. 1 (N.B.).

105. (1960-1), 9 & 10 Eliz. II, c. 19 (N.B.). [For recent amendments, see the Addendum, at p. 496. See also The Clean Environment Act, discussed in the Addendum, at pp. 493-6].

106. *Ibid.*, s. 10, as enacted by (1968), 17 Eliz. II, c. 58, s. 6 (N.B.).

107. SOR (1963 Cons.), reg. 170, ss. 2,3 (N.B.). [Now the Minister of Health alone; see Addendum, p. 496].

108. *Ibid.*, s. 3.

109. (1960-1), 9 & 10 Eliz. II, c. 19, s. 11 (N.B.), as enacted by (1966), 15 Eliz. II, c. 159, s. 4 (N.B.).

110. R.S.N.B., 1952, c. 102. [Now the Minister of Health; see (1971), 20 Eliz. II, c. 31].

111. *Ibid.*, s. 6(1)(c). [See also the Tourism Development Act, discussed in the Addendum, at p. 497].

112. *Ibid.*, s. 6(1)(d).

113. *Ibid.*, s. 1(m).

114. *Ibid.*, s. 6(1)(x).

115. *Ibid.*, s. 6(1)(xa), as enacted by (1965), 14 Eliz. II, c. 19, s. 1 (N.B.).

water supplies¹¹⁶ and sewage systems,¹¹⁷ and empowering municipalities to add fluorine compounds to water supplies, subject to the control of the Minister.¹¹⁸

Under the Mining Act,¹¹⁹ the Minister of Natural Resources may make regulations respecting the disposal of tailings, slimes, waste products, or any noxious or deleterious substance on any lands or into any waters.¹²⁰ This would include ground water deposits.

PRINCE EDWARD ISLAND STATUTES

Use and General Control

The right to the use and control of surface and ground water vests in the owner of land within whose boundaries the water is located. Under the Real Property Act,¹²¹ every deed to land, in the absence of express exception, is construed as passing all water and watercourses. However, while a grant of land permits a grantee to exercise all common law rights respecting the water located therein, certain statutory provisions have the effect of cutting down these rights. An important example is a provision of the recent Planning Act¹²² which prohibits the conveyance of land in certain areas unless subdivided according to an approved plan of subdivision.

Of particular significance in this regard is the Water Authority Act,¹²³ under which the Prince Edward Island Water Authority, discussed in Chapter Four, is constituted¹²⁴ and given control over the use¹²⁵ and allocation¹²⁶ of all surface and ground water. As seems to be the case in New Brunswick, until such control is actually exercised by the authority, common law rights may still be exercised.

Under the Town Act,¹²⁷ a town council may make by-laws relating to the prohibition and licensing of the digging or sinking of wells within town boundaries. Further restrictions on the drilling of wells are provided in the Well Drillers' Act,¹²⁸ which permits the Minister designated to administer the Act to prescribe areas within which wells cannot be bored without a permit, to issue licences, to prescribe methods of digging and to require geological reports and specimens to be supplied to his department. A well is defined in this Act as "any well dug or bored for fresh water for domestic or farm purposes".¹²⁹ Under the regulations to the Act, every person doing business as a well-digger within a prescribed area must first obtain a licence. Furthermore, no person may commence a well within a prescribed area without a licence from the Minister. Inspection and approval procedures

116. N.B. Reg. 60-104, ss. 236-49.

117. N.B. Reg. 69-104, ss. 250-86.

118. N.B. Reg. 66-43, ss. 184-191.

119. (1961-2), 10 & 11 Eliz. II, c. 45 (N.B.).

120. *Ibid.*, s. 27(1)(a).

121. R.S.P.E.I., 1951, c. 138, s. 55.

122. (1968), 17 Eliz. II, c. 40, s. 37 (P.E.I.).

123. (1965), 14 Eliz. II, c. 19 (P.E.I.). [See now *The Environmental Control Commission Act*, discussed in the Addendum, at pp. 498-502].

124. *Ibid.*, s. 3.

125. *Ibid.*, s. 14(a).

126. *Ibid.*, s. 14(b).

127. R.S.P.E.I., 1951, c. 162, s. 78(25).

128. R.S.P.E.I., 1951, c. 174, s. 6.

129. *Ibid.*, s. 1(e).

are also set out in the regulations. The Water Authority Act contains a further restriction on well drilling.¹³⁰

Geophysical or subsurface exploration may only be undertaken upon licence from the Lieutenant-Governor in Council by virtue of the Oil, Natural Gas and Minerals Act.¹³¹ While it is possible that this may only relate to exploration for oil, natural gas or minerals, and not ground water, the section is not that specific. In addition, a regulation under the Act provides that if, in the course of drilling for natural gas or oil, underground water is released and flows to the surface, no further drilling may be carried on; the hole must be plugged and its location reported.¹³² The hole may be completed as a water-well, however, if arrangements have been made with the surface owners, the flow is properly controlled, and damage will not result to other property.¹³³ The regulations further authorize the Minister to prescribe remedial measures where an oil or natural gas well becomes a menace to water-bearing formations,¹³⁴ and direct licensees to make reports as to any water encountered in the course of drilling.¹³⁵

A number of statutes authorize compulsory entry upon private land and interferences with water lying within its boundaries. Under the Expropriation Act,¹³⁶ for example, the Minister having superintendence over a particular work may enter upon, take and use any land and any water located on the land for any purpose necessary to the public work. He is empowered to authorize the alteration of the level of any road or street¹³⁷ or the position of a drain,¹³⁸ which may have the consequential effect of altering the flow of surface water.¹³⁹ Similar provisions exist under the Public Works Act.¹⁴⁰ The Minister of Public Works may take possession of any land or waters where expropriation is necessary for the use, construction, maintenance or repair of a public work or for obtaining better access to it.¹⁴¹ He may also raise or sink the level of any road, which may again have the effect of diverting normal flows of surface water.¹⁴² Powers of expropriation are also given under the Town Act,¹⁴³ whereby a town council may take the land of any person, including rights to surface and ground water, where it is required for the purposes of the town. Under the Village Service Act,¹⁴⁴ where the inhabitants of a village have taken the necessary steps to avail themselves of the powers set out in the Act, and where commissioners have been appointed to carry out the purposes of the Act, the village, through its commissioners, may, for

130. (1965), 14 Eliz. II, c. 19, s. 26(6) (P.E.I.). [See now the Environmental Control Commission Act, discussed in the Addendum, at pp. 496-502].

131. (1957), 6 Eliz. II, c. 24, s. 23 (P.E.I.). [Now repealed and re-enacted, see Addendum, p. 504].

132. Regulations *re* Geophysical Work, made Nov. 14, 1957, s. 19.

133. *Ibid.*

134. Regulations under the Oil, Natural Gas and Minerals Act, made May 12, 1958, s. 25(2).

135. *Ibid.*, s. 39(g).

136. R.S.P.E.I., 1951, c. 53, s. 2(b).

137. *Ibid.*, s. 2(e).

138. *Ibid.*, s. 2(f).

139. Subject to payment of compensation for injury; see, generally pp. 126-8.

140. (1956), 5 Eliz. II, c. 32 (P.E.I.).

141. *Ibid.*, s. 10(b).

142. *Ibid.*, s. 10(e).

143. R.S.P.E.I., 1951, c. 162, s. 93(1)(f).

144. (1954), 3 Eliz. II, c. 39 (P.E.I.).

the purposes of enlarging, improving or repairing a reservoir,¹⁴⁵ or for other purposes,¹⁴⁶ enter upon and take private land.

Further interferences may occur under the Oil, Natural Gas and Minerals Act,¹⁴⁷ under which a person may obtain a special permit to enter upon private land to prospect for oil, natural gas or minerals. Such a right, in some cases, would interfere with the use of ground water by the owner of the land. Under the Power Commission Act,¹⁴⁸ broad authority may be conferred upon the Prince Edward Island Power Commission to effect interferences with the use of private property and the use of private water resources. Powers of expropriation are conferred upon the Commission,¹⁴⁹ and wide authority is given to the Commission to authorize the flooding of land for purposes of accumulating and storing water.¹⁵⁰

Accordingly, while the control of surface and ground water still remains to a considerable extent with the owner of the land, rights and powers are conferred upon numerous public authorities to interfere with these resources and to exercise control over them in pursuance of more public objectives.

Drainage and Sewage

The construction of drains in the province is generally subject to the provisions of the Public Health Act,¹⁵¹ which authorizes the Lieutenant-Governor in Council to make regulations pertaining to the construction, maintenance, cleansing and disinfecting of all drains, sewage systems and sewers.¹⁵² Installation of sewage systems by municipalities within the province are conditioned upon obtaining a certificate of approval from the Lieutenant-Governor in Council.¹⁵³ Permission must also be obtained from the Public Utilities Commission under the Water and Sewerage Act, where the construction is being effected by a public utility.¹⁵⁴ These matters are more fully discussed in Chapter Four.

Other statutory provisions deal with such matters as draining highways and other public works. Under the Public Works Act,¹⁵⁵ for example, the Minister of Public Works may enter upon land for the purpose of making drains to carry water from a public work. Similarly, under the Roads Act,¹⁵⁶ the Minister of Highways may enter upon private land for purposes of draining any new or existing road. Under these statutes, landowners are required to maintain ditches that have been dug on their land for the purpose of draining the public work or highway. For example, under the Roads Act, a duty is imposed on every owner or occupier of land fronting on a highway to see that drains are kept open at the point of

145. *Ibid.*, s. 38(1)(b).

146. *Ibid.*, s. 38(1)(f).

147. (1957), 6 Eliz. II, c. 24, s. 3 (P.E.I.). [Now repealed and re-enacted, see Addendum, p. 504].

148. R.S.P.E.I., 1951, c. 117.

149. *Ibid.*, s. 4.

150. *Ibid.*, s. 2(g).

151. R.S.P.E.I., 1951, c. 129.

152. *Ibid.*, s. 5(5).

153. *Ibid.*, ss. 12-15.

154. (1960), 9 Eliz. II, c. 47, s. 3 (P.E.I.).

155. (1956), 5 Eliz. II, c. 32, s. 10(d) (P.E.I.).

156. (1965), 14 Eliz. II, c. 22 (P.E.I.).

approach to any gateway, lane or other way from his property.¹⁵⁷ It is an offence to create any obstruction to a drain or ditch constructed for the purpose of draining a highway.¹⁵⁸ A duty is placed as well upon every county engineer to order the removal of any obstruction to any drain or ditch and to abate any nuisance in respect of the highways in each particular county.¹⁵⁹

Public drainage within the boundaries of a town is governed by the Town Act, under which a town council may lay out and maintain drains and sewers and make by-laws and regulations for keeping drains and sewers free from obstruction.¹⁶⁰ A town council is further empowered, upon payment of compensation, to acquire and take possession of drains and sewers constructed by private parties along any street,¹⁶¹ to construct sewers or drains upon or across private land, and to enter upon private property and do whatever is necessary to construct or repair a sewer or drain.¹⁶² A village that has taken advantage of the powers set out under the Village Service Act may construct, extend or improve sewers, drains and ditches both within and without the boundaries of the village.¹⁶³ These matters are more fully discussed in Chapter Four.

The Prince Edward Island Water Authority exercises certain controls over drainage and sewage. Where a municipality or person contemplates the establishment or alteration of sewage works, plans and specifications must be forwarded to the Authority, and no such work may be undertaken until the approval of the Authority has been obtained.¹⁶⁴ "Sewage" is broadly defined to include drainage and storm water, except natural run off,¹⁶⁵ and "sewage works" as any works or any part of any works for the collection, transmission, treatment and disposal of sewage.¹⁶⁶ Presumably, therefore, the laying out of ordinary storm drains would be a matter for the approval of the Water Authority. The Authority is further empowered to order any alterations it deems necessary to existing sewage works,¹⁶⁷ and may prescribe the manner in which such systems are to be kept in repair and operated.¹⁶⁸ The Authority would seem, therefore, to be in a position to exercise comprehensive control over all drainage being effected throughout the province.

Pollution

Wide powers exist to control the pollution of surface and ground water in the province. Under the Water Authority Act, the Prince Edward Island Water Authority has control over all water pollution originating within the jurisdiction of the province¹⁶⁹ and is given power to make regulations pertaining to all opera-

157. *Ibid.*, s. 39(2). See also the Public Works Act, (1956), 5 Eliz. II, c. 32, s. 12 (P.E.I.), and the Expropriation Act, R.S.P.E.I., 1951, c. 53, s. 4.

158. *Ibid.*, s. 37(1).

159. *Ibid.*, s. 37(2).

160. R.S.P.E.I., 1951, c. 162, s. 91(1).

161. *Ibid.*, s. 91(2).

162. *Ibid.*, s. 92(1).

163. (1954), 3 Eliz. II, c. 39, ss. 37(c), (e) (P.E.I.).

164. The Water Authority Act, (1965), 14 Eliz. II, c. 19, s. 27(1) (P.E.I.). [See now the Environmental Control Commission Act, discussed in the Addendum, at pp. 498-502].

165. *Ibid.*, s. 2(h).

166. *Ibid.*, s. 2(i).

167. *Ibid.*, s. 27(4).

168. *Ibid.*, s. 27(5).

169. *Ibid.*, s. 14(c). [See now the re-enacted Act, discussed in the Addendum, at pp. 498-502].

tions involving the pollution of water.¹⁷⁰ It has additional authority to order alterations in an existing water works where the quality of the water is a menace to public health.¹⁷¹

Under the Act, municipalities and persons are prohibited, without permission from the Authority, from discharging or depositing any material into any water, or in any place where the consequence might be to pollute or impair water available for beneficial use.¹⁷² "Beneficial use" is broadly defined as a use of water, including the method of diversion, storage, transportation, and application, that is reasonable and consistent with the public interest in the proper utilization of water resources.¹⁷³ "Pollution" is defined as any alteration of the physical, chemical, biological, or aesthetic properties of the waters of the province, including change of the temperature, taste or odour of the waters, or the addition of any liquid, solid, radio-active, gaseous or other substance to the waters or the removal of such substances from the waters, which will render or is likely to render the waters harmful to the public health, safety, or welfare, or harmful or less useful for domestic, municipal, industrial, agricultural, recreational or other lawful uses.¹⁷⁴ Clearly, the pollution of any water in the province, including surface and ground water, is an offence, unless exempted by the Authority.

Under the Public Health Act, the Minister of Health may make regulations to prevent the pollution, defilement, discolouration and fouling of pools and springs.¹⁷⁵ Under the Oil, Natural Gas and Minerals Act,¹⁷⁶ regulations are in effect which relate in a more limited way to preventing the waste and defilement of water resources. Provision is made that no well shall be drilled beyond any oil, gas, or water stratum until the oil, gas or water in such stratum is sealed off by mud-laden fluid, or by casing, or by cement, or by other approved methods.¹⁷⁷ In addition, every licensee or lessee must take reasonable and proper precautions to prevent waste¹⁷⁸ and must take all reasonable steps in disposing of earth, rock, waste or refuse, so as to avoid an inconvenience or obstruction to any water.¹⁷⁹ Furthermore, a regulation under the Well Drillers Act makes it an offence to construct or convert a well to dispose of waste material, without a permit from the Minister.¹⁸⁰

NOVA SCOTIA STATUTES

Introduction

Two Nova Scotia statutes give broad powers over surface and ground waters. They are the Water Act¹⁸¹ and the Public Health Act.¹⁸² The Minister appointed under the Water Act is given control and general supervision of the use of all

170. *Ibid.*, s 18.

171. *Ibid.*, s. 26(4) (a).

172. *Ibid.*, s. 17.

173. *Ibid.*, s. 2(b).

174. *Ibid.*, s. 2(g).

175. R.S.P.E.I., 1951, c. 129, s. 5(14).

176. (1957), 6 Eliz. II, c. 24 (P.E.I.). [See now the re-enacted Act, discussed in the Addendum, at p. 504].

177. Made May 12, 1958, s. 31.

178. Made May 12, 1958, s. 45.

179. Made May 12, 1958, s. 46(1).

180. Made June 21, 1950, s. 5.

181. R.S.N.S., 1967, c. 335; as amended by (1968), 17 Eliz. II, c. 64; (1970), 19 Eliz. II, c. 77.

182. R.S.N.S., 1967, c. 247.

surface, ground and shore waters as well as the power to designate how the water is to be allocated.¹⁸³ This empowers the Minister to assert control over all waters in the province, including sewers and drains, swamps and flood waters, wells and water works. The Public Health Act empowers the Minister of Health, with the approval of the Lieutenant-Governor in Council, to make regulations with respect to any matter relevant to the public health.¹⁸⁴ Under this Act, regulations have been made respecting water supply, washrooms, sewage disposal, drainage, laundry and swimming and other water activities at summer camps.¹⁸⁵

Drainage and Sewage

As already mentioned, the Water Act and the Public Health Act are the two major statutes dealing with sewers and drains in the province. They give the respective Ministers power to set the standards for sewers and drains, and thus restrict the ordinary land owner from building sewers as he pleases.

The Water Act gives the Minister wide control over the location and standards of sewers in Nova Scotia by requiring any municipality or person contemplating the establishment or extension of any sewage works to submit the plans, the location of the discharge of the effluent and such other information as the Water Resources Commission shall require to the Commission for approval jointly by the Minister appointed under the Water Act and the Minister of Public Health. If the municipality or person fails to comply with these requirements, the Minister appointed under the Water Act may request an investigation of the works and the location of the discharge of the effluent, and may order such changes as he deems necessary at the expense of the municipality or person. The Minister is given broad power to set the standard required of each individual sewage work in the province.¹⁸⁶

As mentioned earlier, the Public Health Act gives the Minister of Public Health, with the approval of the Lieutenant-Governor in Council, power to make regulations respecting any matter relevant to the public health. In particular, he may make regulations respecting the plumbing and draining of buildings, and public drains and sewers,¹⁸⁷ and for preventing pollution of lakes and streams. The regulations respecting summer camps have already been mentioned.¹⁸⁸ In addition, section 38(1) requires that no one shall instal a private sewage disposal system except with the written permission of the Board of Health. "Private sewage disposal system" is defined as including a septic tank with disposal field.¹⁸⁹ A penalty is provided against anyone who causes or permits any sewage or matter to discharge on or adjacent to any street or into any drain on any street.¹⁹⁰ It is further provided that when the establishment of a public water supply or system or sewage system is contemplated by a municipality or by any person, the muni-

183. R.S.N.S., 1967, c. 335, s. 12, as amended by (1968), 17 Eliz. II, c. 64, s. 6; (1970), 19 Eliz. II, c. 77, s. 5 (N.S.).

184. R.S.N.S., 1967, c. 247, s. 11(1).

185. Made July 25, 1967 and tabled Dec. 1, 1967.

186. R.S.N.S., 1967, c. 335, s. 14.

187. R.S.N.S., 1967, c. 247, s. 11(1),(c),(d).

188. See p. 141.

189. R.S.N.S., 1967, c. 247, s. 38(4).

190. *Ibid.*, s. 40(6).

cipality or person must submit plans relating to the establishment or extension of a system to the Minister of Health, and that work shall not commence until the plans have been approved.¹⁹¹

Sewers and drains in towns are regulated by the Towns Act¹⁹² and the Town Planning Act.¹⁹³ The Towns Act empowers a town, with the consent of the Minister of Municipal Affairs, to construct and operate its public sewers and drains outside its limits other than in a city or another incorporated town.¹⁹⁴ A town council has authority to build all drains and sewers it deems necessary.¹⁹⁵ The council is also empowered to construct sewers across the land of any person after giving him notice, and may also grant the right to any person or persons who apply to construct a sewer.¹⁹⁶ Some protection is given the landowner by requiring that such sewer or drain be not less than four feet below the surface of the ground and suitably covered.¹⁹⁷

A town council may, by resolution or by-law, require the owner of any building within sixty feet of any portion of a sewer line to construct a drain to connect with the sewer line. It may, however, exempt from this requirement any building adequately served with a sewer and drainage or that would not be adequately served by connection with the sewer line of the town. The council may require owners of buildings that are now connected with the sewer line that previously had outhouses or septic tanks to remove and destroy them.¹⁹⁸ Finally, the council has general power to make by-laws in respect of all matters regulating or protecting drains, sewers and watercourses in the town.¹⁹⁹

The Town Planning Act provides for the establishment of town planning boards,²⁰⁰ which are given power to make additional regulations respecting subdivisions of land within their jurisdiction, including provisions for sewers.²⁰¹ A planning board may require any subdivider before a subdivision is approved to instal water and sewage services which meet the specifications laid down in the town by-laws or regulations.²⁰² Sections 53 and 54 of the Act make provisions respecting the function of the Halifax-Dartmouth and County Regional Planning Commission. Section 54(1) prohibits any person or board from extending any water supply line or sewer line in excess of 100 feet within the regional area, from acquiring any additional water supply source or any sewer outfall at tidewater, or from building any sewage treatment facilities in the regional area until plans thereof are presented to the Commission for its consideration.

The Village Service Act deals with sewers and drains in villages with a population of at least 100 persons.²⁰³ Village commissioners are empowered to do all things necessary for carrying out the provisions of the Act and, in parti-

191. *Ibid.*, s. 41(1).

192. R.S.N.S., 1967, c. 309.

193. R.S.N.S., 1967, c. 308.

194. R.S.N.S., 1967, c. 309, s. 116(1).

195. *Ibid.*, s. 174(1).

196. *Ibid.*, s. 175(1), (2).

197. *Ibid.*, s. 175(3).

198. *Ibid.*, s. 176.

199. *Ibid.*, s. 221(5)(a).

200. R.S.N.S., 1967, c. 308, s. 2(1).

201. *Ibid.*, s. 28(9)(c).

202. *Ibid.*, s. 28(9)(d).

203. R.S.N.S., 1967, c. 329, s. 2.

cular, to construct, alter or maintain sewers, drains and ditches within and without the bounds of the village.²⁰⁴ As in the case of towns, village commissioners may require the owner of all buildings which are not more than 60 feet from any portion of the sewer line to connect with it, and require the owner of any outhouse or septic tank to destroy or remove it upon requiring him to connect with the sewer.²⁰⁵ Buildings that are adequately served with sewer and drainage, or for which sewer service is not required or which would not be adequately served by connection with the sewer line, are exempted.²⁰⁶ The village commissioners are given general power to make by-laws for regulating or protecting drains, sewers or water courses in the village.²⁰⁷

The law relating to sewers and drains in municipalities appears in the Municipal Act²⁰⁸ and is similar to that relating to villages. A municipality that has acquired a sewer drainage system may require the owner of every building not more than 60 feet from any portion of the sewer line to construct a drain and connect it with the sewer line.²⁰⁹ The municipal council may exempt such buildings as appear to be adequately served with sewer and drainage or which would not adequately be served by connection with the sewer line of the municipality. Owners of outhouses and septic tanks serving buildings that have been connected with sewer may be required to remove or destroy them. In addition, the council is given power to make by-laws regulating the use of and protecting drains, sewers or water courses in the municipality and imposing charges or rates for the use of drains or for sewer and drain frontage.

The council may, with the consent of the Minister of Municipal Affairs, expropriate land whether situated within that municipality or elsewhere, to construct or improve sewers or drains, or any connection therewith, or to construct or improve a water system.²¹⁰ Land is given a broad interpretation and includes a stream, land covered with water, a right of way or easement, or any interest in land.²¹¹

One further public municipal statute concerns sewers and drains. The Municipal Affairs Act authorizes the borrowing of money by towns, villages, cities and municipalities to construct or improve culverts, drains, sewers or the water system.²¹²

It should be mentioned that a number of private Acts deal with the discharge by certain municipal units of sewage in streams and rivers.²¹³ However, it should be remembered that the Water Act gives broad powers of supervision and control over this matter to the Water Resources Commission.

204. *Ibid.*, s. 38(1).

205. *Ibid.*, s. 39(1)(a),(b).

206. *Ibid.*, s. 39(1)(c).

207. *Ibid.*, s. 42(1).

208. R.S.N.S., 1967, c. 192.

209. *Ibid.*, s. 203(1)(a),(b).

210. *Ibid.*, s. 172(1)(c),(d).

211. *Ibid.*, s. 172(2).

212. R.S.N.S., 1967, c. 193.

213. (1902), 2 Edw. VII, c. 109 (N.S.) relates to the discharge of sewage in the Cornwallis River by the Town of Wolfville; (1902), 2 Edw. VII, c. 114 (N.S.) relates to the discharge of sewage by the Town of Bridgewater in the La Have River; (1903), 3 Edw. VII, c. 173, amended (1906), 6 Edw. VII, c. 140 (N.S.) relates to the discharge of sewage by the Town of Stellarton in the East River.

Three Acts deal with sewers and drains in relation to mines. They are the Metalliferous Mines and Quarries Regulations Act,²¹⁴ The Mines Act,²¹⁵ and The Mining Companies Easement Act.²¹⁶

Section 14 of the Metalliferous Mines and Quarries Regulation Act sets out safety regulations governing the handling of waters in mines. Regulation 208 requires that the written permission of an inspector be obtained before a bulkhead or dam is constructed underground, and that construction must be according to plans approved by him. This regulation does not apply to a small structure that is less than three feet in height, is used solely for diverting the ordinary level drainage, and impounds less than 25 tons of water. Regulation 209 requires that every working mine be provided with suitable and efficient machinery for keeping the mine free from water which might accumulate. Regulation 210 provides that boreholes be made well in advance where any working in a mine approaches any place where there may be an accumulation of water, and regulation 212 requires that all sumps be securely covered except when being repaired.

The Mines Act²¹⁷ provides that where any lessee of land from the Crown requires any adjoining land in order to drain water from a mining operation or for any similar purpose and the owner of that land is unwilling to accept the price offered by the owner of the mining interest for the privilege, the owner of the mining interest may take proceedings under the Mines Act to enable him to acquire such property right or interest. A similar procedure is provided for lessees of submarine areas wishing to ventilate or drain their mine by means of a tunnel through adjoining areas held under lease by any other person.²¹⁸ Finally, section 127(1) provides that the Minister of Mines may cause any mine repossessed by the Crown from the lessee to be kept free from water and instal the necessary equipment to do so.

The Mining Companies Easements Act²¹⁹ provides that when any company, incorporated for the purpose of mining or drilling for oil or gas who are lessees of such rights from someone other than the Crown under the Mines Act, requires lands, lakes, streams or lands covered with water or easements or rights for the purposes set out in section 111 of the Mines Act, or for the purposes of laying and maintaining pipelines in order to mine or drill for oil or gas, then such company may acquire rights to the same extent as if it were a lessee from the Crown under the Mines Act, and for such purposes such company shall be considered to be a lessee within the meaning of section 111(1) of the Mines Act. Such a company is given the right to construct roads, subways, pipelines or conduits over, along, under and across any brooks, streams and rivers not being navigable waters, subject, however, to regulations to be made by the Lieutenant-Governor in Council.

The Public Highways Act gives the Minister of that department the right to construct or repair any drain, gutter, sluice or watercourse on any land adjoining a

214. R.S.N.S., 1967, c. 183.

215. R.S.N.S., 1967, c. 185.

216. R.S.N.S., 1967, c. 187.

217. R.S.N.S., 1967, c. 185, s. 111(1).

218. *Ibid.*, s. 119(1).

219. R.S.N.S., 1967, c. 187, ss. 1, 2.

highway and for such purpose to at any time enter into and upon any such land.²²⁰ Section 3(2) prescribes a penalty against anyone who obstructs the Minister from doing so. The Act prescribes other penalties relating to sewers and drains on the highway. Section 40 provides a penalty against an owner or occupant of land adjoining a highway who permits any drain, gutters, sluices or watercourse on the highway to be clogged for any purpose whatever. Again section 42 prescribes a penalty against anyone who deposits any sewage, garbage or rubbish in any drain, gutter, sluice or watercourse on a highway, or causes any sewage, garbage or rubbish to discharge or flow upon any highway or into any drain, gutter, sluice or watercourse on a highway.

The Ditches and Watercourses Act²²¹ also contains provisions respecting drains. It provides that where owners of lands would be benefited by making a ditch or drain or by enlarging a drain already made, such owners shall open and make, deepen or widen a just and fair proportion of such ditch or drain according to their interests in its construction. Such ditches or drains are to be kept and maintained as they were opened, deepened or widened by the owners, unless in consequence of altered circumstances the engineer appointed by the council otherwise directs. The engineer is empowered to do so upon application by any person interested in the manner prescribed. A ditch or drain constructed under the Act must be continued to a proper outlet so that no lands will be overflowed or flooded by the construction of such ditch except with the consent of the owner. It is lawful to construct such ditch over any number of lots until the proper outlet is reached.²²² A person on whose land such ditch is constructed may, with the consent of the engineer, convert so much of the ditch or drain as runs through the lands of such person into a covered drain.²²³ This person, and the subsequent owners, must maintain and keep the covered portion of the drain of such sufficient size and capacity as not to impede or delay the free flow of water above the covered portion or brought thereto by such drain. Such person is responsible for any damages occasioned by his neglect.²²⁴

The Lands and Forests Act²²⁵ contains a provision for encouraging the draining of lands that are of little use owing to surplus water. Section 31(1) of the Act provides that the Lieutenant-Governor in Council may, upon recommendation of the Minister, give a lease of Crown lands if the land proposed to be leased is of inferior quality and the person proposing to lease it undertakes to spend money in draining, dyking, or developing it. By section 38 of the same Act, the Minister, with the approval of the Lieutenant-Governor in Council, may grant permission for the construction and maintenance in or on Crown lands of water, sewer, gas or oil pipelines.

The Agriculture and Marketing Act²²⁶ has a provision with a similar purpose as section 31(1) of the Lands and Forests Act. Section 200(b) of that Act allows the Minister of Agriculture to enter into an agreement with the federal

220. R.S.N.S., 1967, c. 248, s. 43(1).

221. R.S.N.S., 1967, c. 78.

222. *Ibid.*, s. 4(1), (2).

223. *Ibid.*, s. 21(1).

224. *Ibid.*, s. 24.

225. R.S.N.S., 1967, c. 163.

226. R.S.N.S., 1967, c. 3.

government or some federal agency covering programs of work for the protection, reclamation or more effective utilization of land and allows the Minister to construct drains, ditches, canals or other works necessary for the improvement of land.

The Hotel Regulations Act²²⁷ also deals briefly with sewers and drains. It empowers the Lieutenant-Governor in Council to make regulations respecting hotel drainage and sewage systems.

Finally, certain powers of expropriation relating to drains and sewers must be mentioned. Some of these appear in the Expropriation Act,²²⁸ which gives any Minister dealing with a public work power to divert or alter the position of any water pipe, gas pipe, sewer or drain for any purpose relative to the use, construction or maintenance of the public work, or for obtaining better access thereto. Where it is necessary in the building or repairing of a public work to construct any ditch or drain for carrying water, the owner is required, when such ditch or drain is completed, to maintain it to the same extent as he might by law be required to do if it had always existed.²²⁹

Another power of expropriation is given by the Power Commission Act.²³⁰ The Act gives the Power Commission extensive powers to deal with and expropriate lands, waters and rights over lands and waters if necessary or incidental to its purpose of generating and supplying electric power and energy. The Commission is given the right to divert, transmit, distribute, or otherwise dispose of water and to do anything incidental thereto.²³¹ It also has power to purchase or expropriate watercourses, water privileges or lands necessary for developing electric power. Finally, the Commission is empowered to expropriate lands, watercourses, easements or other privileges necessary for the accumulation, storage or other disposition of water.²³² These general sections would appear to enable the Commission to deal with sewers and drains as long as they affect or relate to its purposes.

Swamps and Flood Waters

As already mentioned, the Water Act gives the Minister appointed under the Act control of the use of surface, ground and shore waters.²³³ This includes control of swamps and flood waters. While the Public Health Act²³⁴ does not specifically refer to swamps and flood waters, it does provide that the Minister of Health may, with the approval of the Lieutenant-Governor in Council, make regulations respecting any matter relevant to the public health. In particular, the Minister may make regulations for safe water supplies²³⁵ and in order to do this it may be necessary to control sources of waters and systems of distribution. This would naturally allow the Minister to make regulations regarding swamps if

227. R.S.N.S., 1967, c. 127, s. 10(1)(c). Regulations under the Act were made Dec. 14, 1961, and amended July 25, 1967.

228. R.S.N.S., 1967, c. 96, s. 2(1)(f).

229. *Ibid.*, s. 4.

230. R.S.N.S., 1967, c. 233.

231. *Ibid.*, s. 22(1).

232. *Ibid.*, s. 22(2)(c).

233. R.S.N.S., 1967, c. 335, s. 12(a).

234. R.S.N.S., 1967, c. 247, s. 11(1).

235. *Ibid.*, s. 11(1)(b).

he considered them unsafe as a source of water. Specific provision is also made for the making of regulations respecting the drainage of premises.²³⁶ The regulations respecting summer camps previously referred to may be partially justified under this power.²³⁷

As mentioned in dealing with sewers and drains, the Nova Scotia Power Commission is given wide authority to deal with water resources. This includes power to deal with swamps and flood waters if the Commission wishes to utilize them as a source of water.²³⁸ It is also empowered to expropriate lands or quarries capable of producing peat or any other material for the generation of electric power and energy.²³⁹ As peat is often found in swamps, this means that the Commission has power to expropriate lands on which the swamps are found. Finally, the Commission is empowered to expropriate lands and watercourses or water privileges necessary for producing electric power. This means that they may expropriate lands in order to control flood waters.²⁴⁰

Flood waters are dealt with in the Public Highways Act which provides a penalty against any owner of land who accumulates water on his land and allows it to overflow upon the highway.²⁴¹ He is made liable for all damage to the highway, gutters or drains,²⁴² and if the collection of such water requires a larger drain, sluice or culvert on the highway, he is liable to pay the expenses of any alteration or construction.²⁴³

Another important statute mentioned earlier is the Ditches and Watercourses Act, which provides that where owners of lands would benefit by the deepening or widening of a ditch or drain already made or by making or widening a ditch or drain for the purpose of taking off surplus water or to better enable the owners to cultivate or use the land, then each such owner shall be responsible for opening or deepening such ditch according to their several interests.²⁴⁴ It further provides that every such ditch or drain must be continued to a proper outlet so that no lands will be overflowed or flooded by the construction of such ditch except with the consent of the owner.²⁴⁵

The Marshland Reclamation Act gives the Minister, with the approval of the Lieutenant-Governor in Council, power to construct, operate or maintain works for the protection, drainage or improvement of marshlands.²⁴⁶ The Act also gives private owners of marshland the right to petition the Provincial Secretary that they be incorporated into a marsh body.²⁴⁷ This body makes decisions regarding the development and maintenance of the marshland over which it has control. The petition to the Provincial Secretary must contain the boundary size of the section of marshland, the names of all persons believed to be within this section,

236. *Ibid.*, s. 11(1)(c).

237. See pp. 141, 446.

238. R.S.N.S., 1967, c. 233, s. 22(1).

239. *Ibid.*, s. 22(2).

240. *Ibid.*, s. 22(2)(b),(c).

241. R.S.N.S., 1967, c. 248.

242. *Ibid.*, s. 44(1).

243. *Ibid.*, s. 44(3).

244. R.S.N.S., 1967, c. 78, s. 4(1).

245. *Ibid.*, s. 4(2).

246. R.S.N.S., 1967, c. 177; see *Latta v. Kelly*, [1925] 1 D.L.R. 116.

247. *Ibid.*, s. 11(1).

the approximate amount of marshland owned by each owner within the section, the proposed name of the body, and the names of not less than three and not more than nine people to be the Provisional Executive Committee to the body. The Provincial Secretary may grant the petition if he is satisfied that it is signed by not less than two-thirds of the owners or occupants of the marshland within the section who are resident in the province and that the persons so signing are owners of not less than one-half the marshland within the section.

There are also a number of private Acts dealing with marshes and marshlands.²⁴⁸

Wells

As already mentioned, the Water Act gives the Water Resources Commission control and general supervision of surface and ground waters.²⁴⁹ This would include the control of wells. Section 16 of the Act provides that before a municipality or person discharges or deposits any material of any kind into a well that may cause pollution or impair the quality of the water for beneficial use, the approval of the Minister appointed under the Water Act and the Minister of Public Health must be obtained. Moreover, the Public Health Act²⁵⁰ authorizes the Minister, with the approval of the Lieutenant-Governor in Council, to make regulations providing for safe and sanitary water supplies and for the control of sources of water. This means that the Minister may make regulations regarding wells and their location. Regulations respecting the location and sources of water supply at summer camps fall under this provision.²⁵¹ The Public Health Act provides more detailed standards regarding wells.²⁵² It requires all wells, whether public or private, to be kept in safe and sanitary condition, and to be located so as to be free from danger of contamination from stables, barns, sewers or any other source. If the Board of Health feels that the well is not in a safe and sanitary condition, it may order the well to be filled up or closed.

The drilling of wells is regulated by several statutes. The Well Drilling Act provides that anyone wishing to drill a well for another person for gain or reward or carry on the business of well drilling or hold himself out as a well driller must obtain a licence.²⁵³ "Well" is defined as "an artificial opening in the ground from which water is obtained or made for the purpose of exploring for or obtaining water".²⁵⁴ The Lieutenant-Governor in Council is given power to make regulations, subject to the Public Health Act, regulating and controlling the location, spacing, drilling, construction, testing, alteration, and other facets of well drilling.²⁵⁵

248. (1893), 56 Vict., c. 81 (N.S.) gives the Fort Lawrence Marsh Commissioners powers relating to that marsh; (1897), 60 Vict., c. 110 gives the Old Barnes New Marsh Co. power over the Cobequid marsh; (1897), 60 Vict., c. 113 (N.S.) gives the Missiquash Marsh Co. Ltd. powers relating to that marsh; (1901), 1 Edw. VII, c. 104 (N.S.) gives West Hants powers relating to the Falmouth marsh; (1944), 8 Geo. VI, c. 79 (N.S.) gives powers to the Habitant Marsh Co. Ltd. over that marsh.

249. R.S.N.S., 1967, c. 335, s. 12; as amended by (1968), 17 Eliz. II, c. 64; (1970), 19 Eliz. II, c. 77, s. 5.

250. R.S.N.S., 1967, c. 247, s. 11(1).

251. Made July 25, 1967, and tabled Dec. 1, 1967.

252. R.S.N.S., 1967, c. 247, s. 37.

253. R.S.N.S., 1967, c. 337, s. 2.

254. *Ibid.*, s. 1(f).

255. *Ibid.*, s. 9(g).

Regulations have been made providing for a system of licences and fees, and records and reports to be supplied by licences, as well as for regulating the construction of wells, including the distances which wells must be located from cess-pools, sewers and other sources of pollution, and the testing of wells.²⁵⁶ Regulations²⁵⁷ under the Hotel Regulations Act²⁵⁸ also have provisions respecting the construction and location of wells and the testing of water for drinking purposes. In addition, the Towns Act²⁵⁹ and the Municipal Act²⁶⁰ empower town and municipal councils to make by-laws regulating, prohibiting or licensing the digging or sinking of wells.

A general provision in the Power Commission Act gives the Power Commission the right to expropriate or lease any wells capable of producing gas, oil or other material such as water for the generation of electric power.²⁶¹

Water Works

The powers given the Minister appointed under the Water Act²⁶² to control and supervise the use of all surface, ground and shore waters, to allocate the use of water, and to control the alteration of the natural features of any water-course or lake, and the natural movement of water therein, obviously includes the control of water works. The Act also contains specific provisions respecting water works, which are defined as meaning "a public, commercial or industrial works for the collection, production, treatment, storage, supply and distribution of water, or any part of any such works."²⁶³ Section 13 specifically requires that when a municipality or person contemplates the establishment of water works, or a change in existing water works, the plans and specifications of the works to be undertaken must be submitted to the Water Resources Commission for the joint approval of the Minister appointed under the Water Act and the Minister of Public Health. If the municipality or person proceeds with such water works without obtaining the permission of the Water Resources Commission, the Commission may investigate the works and require any changes to be made that it deems necessary. Approval of the water works may be refused by the Minister of Public Health if he thinks the water in the existing water works is a menace to the public health or if, in his opinion, any existing water works require alteration. Section 13(5) gives a very general and comprehensive power to the Minister by requiring all water works to be maintained, kept in repair, and operated in such manner as may be directed from time to time by the Minister.

The Public Health Act contains a similar provision under which the Minister must approve plans for a public water supply.²⁶⁴ Moreover, the Minister is

256. Made Oct. 26, 1964 (tabled Feb. 18, 1965), as amended Jan. 24, 1966 (tabled Feb. 23, 1966), and May 14, 1968 (tabled Feb. 20, 1969).

257. Made Dec. 14, 1961 and amended July 25, 1967.

258. R.S.N.S., 1967, c. 127.

259. R.S.N.S., 1967, c. 309, s. 221(60).

260. R.S.N.S., 1967, c. 192, s. 191(89).

261. R.S.N.S., 1967, c. 233, s. 22(2)(c).

262. R.S.N.S. 1967, c. 335, s. 12, as amended by (1968), 17 Eliz. II, c. 64, s. 6 and (1970), 19 Eliz. II, c. 77, s. 5.

263. *Ibid.*, s. 1.

264. R.S.N.S., 1967, c. 247, s. 41(1).

empowered to make regulations providing for safe water supplies.²⁶⁵ The regulations respecting summer camps have already been mentioned.²⁶⁶

Various regional planning boards, commissioners and councils are given powers by various statutes to make regulations concerning the construction and use of water works. The Town Planning Act provides that a town planning board with the approval of the council and of the Minister of Municipal Affairs may prescribe additional regulations respecting the installing of water services within subdivisions under their jurisdiction.²⁶⁷ In Part VI of the Act, which deals with the Halifax-Dartmouth and County Regional Planning Commission, there is a provision that requires any town planning board of a participating unit not to approve plans presented to it for extending or reducing a water supply or sewer line in excess of 100 feet, or for the acquisition of any additional water supply source, until the plans are presented to the Commission for its consideration.²⁶⁸ Another provision of that Part prohibits any person, committee or corporation from extending any water supply line in excess of 100 feet or acquiring any additional water supply source within the regional area without having first presented its plans for the consideration of the Commission.²⁶⁹

Under the Towns Act a town may, with the consent of the Minister, alter, construct or improve its water works and water system both outside its limits and in any municipality other than a city or another incorporated town, and may acquire such lands or machinery as is necessary to supply such services.²⁷⁰ A similar power is given to village commissioners by the Village Service Act.²⁷¹ In addition, the village commissioners may make by-laws regulating or protecting watercourses in the village.²⁷²

The Municipal Act²⁷³ and the Municipal Affairs Act²⁷⁴ contain provisions authorizing municipalities, towns, and cities to borrow or raise money needed for the construction of water works. In addition, the Municipal Act authorizes a municipal council to acquire any land necessary to create, alter or improve a water system or a water works or any connection therewith.²⁷⁵

Reference may also be made to the regulations²⁷⁶ under the Hotel Regulations Act²⁷⁷ respecting water supply to hotels.

The Mining Companies Easements Act²⁷⁸ may also affect water works affecting ground and surface waters. It gives, to any mining company which is not a lessee from the Crown under the Mines Act, the right to acquire land, lakes or

265. *Ibid.*, s. 11(b).

266. See p. 141.

267. R.S.N.S., 1967, c. 308, s. 28(9).

268. *Ibid.*, s. 53(1)(c), (d).

269. *Ibid.*, s. 54(1).

270. R.S.N.S., 1967, c. 309, s. 116(1).

271. R.S.N.S., 1967, c. 329, s. 38(1)(d).

272. *Ibid.*, s. 42(6).

273. R.S.N.S., 1967, c. 192, s. 136(40).

274. R.S.N.S., 1967, c. 193, ss. 5(f), 8, 9.

275. R.S.N.S., 1967, c. 192, s. 172(1)(c).

276. Made Dec. 14, 1961, and amended July 25, 1967.

277. R.S.N.S., 1967, c. 127, s. 10(1)(k),(l).

278. R.S.N.S., 1967, c. 187, s. 1.

rights therein for any of the purposes set out in section 111 of the Mines Act²⁷⁹ (one of which is supplying miners' dwellings with waters) in the same manner as if the company were a lessee from the Crown.

Under the Power Commission Act the Nova Scotia Power Commission is given general authority to deal with water works as it is necessary in the distribution and generation of electric power.²⁸⁰ More detailed provisions give the Commission power to purchase, lease or expropriate water-courses, water privileges and water works necessary for the distribution of electric power.²⁸¹

NEWFOUNDLAND STATUTES

Ownership, Use and General Control

General regulation and control of surface and ground waters in Newfoundland is provided by the Water Resources and Pollution Control Act, proclaimed in force in 1967.²⁸² By this Act the property and the right to the use and flow of all water at any time, in any body of water in the province, is declared to be vested in Her Majesty.²⁸³ This, however, is made subject to any rights conferred on any municipal authority, person or company under certain specified Acts and a trust indenture or any other statute, or any grant, lease, licence or other instrument.²⁸⁴ "Body of water" is defined as any "surface, or subterranean source of fresh water supply and includes any river, stream, brook, creek, watercourse, lake, pond, spring, lagoon, ravine, gulch, canal, and any other flowing or standing water, as well as the land usually or any time occupied by the body of water".²⁸⁵ Thus all the surface and ground waters in the province would seem to be covered, and consequently their ownership is vested in Her Majesty.

A statutory provision in a similar vein is found in the Crown Lands, Mines and Quarries Act of 1961,²⁸⁶ which expressly provides that a quarry lease granted pursuant to provisions of the Act does not convey an exclusive right or privilege relating to any spring or other body of water on, passing through, or adjacent to the land granted in the lease.

The Water Resources and Pollution Control Act creates a corporation designated as the Newfoundland and Labrador Water Authority, which is given control of the use of all surface and ground waters.²⁸⁷ The corporation is also given the power to allocate the use of waters and to control the alteration of the natural features of any body of water and the natural flow of the water in it. The Minister of Economic Development is charged with the administration of the Act and is concerned with the conservation, development, control, improvement and proper utilization of water resources and, to this end, is required to co-operate

279. R.S.N.S., 1967, c. 185.

280. R.S.N.S., 1967, c. 233, s. 22(1).

281. *Ibid.*, s. 22(2) (c).

282. 1966-7, No. 57. (Nfld.). [Now repealed and re-enacted with minor modifications so far as water is concerned by the Clean Air, Water and Soil Authority Act; see Addendum, pp. 505-6].

283. *Ibid.*, s. 17(1).

284. *Ibid.*, s. 17(2).

285. *Ibid.*, s. 2(e).

286. 1961, No. 1, s. 86 (Nfld.).

287. 1966-7, No. 57, s. 4 (Nfld.). [See now the Clean Air, Water and Soil Authority Act, discussed in the Addendum, at pp. 505-6].

with other governmental departments and agencies at all levels.²⁸⁸ In addition, the Minister of Economic Development and the Minister of Health are given general control over new water works and sewage systems, as well as any alterations to the existing works, in order to safeguard public health.²⁸⁹

Apart from the general provisions relating to surface and ground waters and specific provisions concerning irrigation found in the Water Resources and Pollution Control Act, statutory provisions in other Acts deal primarily with sewage and drainage facilities, both inside and outside of the municipal areas, and with the pollution of water supplies.

Drainage

Drainage within municipalities in Newfoundland, including local improvement districts and areas governed by town and rural district councils, but excluding the cities of St. John's and Corner Brook, is regulated by the Local Government Act²⁹⁰ and the Community Councils Act.²⁹¹ However, the Water Resources and Pollution Control Act does provide that when any municipal authority or person contemplates a drainage diversion or any alteration of a body of water, the plans and such other information as the Authority may require must be submitted to it and the proposed work cannot be undertaken nor proceeded with until the Minister of Economic Development has given written approval of the work.²⁹²

The Local Government Act contains provisions which permit the local governments to regulate and control the building of cesspools, septic tanks and sewers, and gives the municipal councils general powers to construct, maintain and repair drains and sewers.²⁹³ Authority is also given to take possession of privately-owned drains, if necessary, and to enter upon private property and construct drains and make regulations for the protection of drains. The power to prohibit the digging of drains, ditches and culverts that are considered dangerous to public health is also granted to the local councils by the Act.

Drainage in areas outside those coming under the control of the local town or rural district council is governed by the Building Standards Act.²⁹⁴ Cleansing and disinfection of all drains and sewer systems is the responsibility of the Minister of Health pursuant to a 1966 amendment to the Department of Health Act.²⁹⁵

Power to construct drains and general control of them is contained in several special Acts dealing with the cities of St. John's²⁹⁶ and Corner Brook,²⁹⁷ as well as in special Acts incorporating individual water and light companies.²⁹⁸

288. *Ibid.*, s. 18. [The Minister of Mines, Agriculture and Resources is the responsible Minister for the Clean Air, Water and Soil Authority Act; see Addendum, p. 505].

289. *Ibid.*, ss. 22, 24. [Under the Clean Air, Water and Soil Authority Act, the Minister of Mines, Agriculture and Resources is solely responsible; see Addendum, p. 505].

290. 1966, No. 31, (Nfld.).

291. 1962, No. 1 (Nfld.).

292. 1966-7, No. 57, s. 27 (Nfld.).

293. 1966, No. 31; as amended by 1966-7, No. 15, ss. 60, 61, 66-9 (Nfld.).

294. 1958, No. 38 (Nfld.).

295. 1966, No. 73, s. 7 (Nfld.).

296. 1966, No. 73, s. 7 (Nfld.).

297. City of Corner Brook Act, 1968, No. 37 (Nfld.).

298. Heart's Content Water Supply Act (1883), 46 Vict., c. 21, ss. 2, 3; Grand Bank Water Company Act (1915), 6 Geo. V. c. 5, ss. 15, 41; Clarendville Light and Power Company Limited Franchise Act (1933), 23 & 24 Geo. V, c. 2, s. 11; Carol Lake Company Act, 1959, No. 38, s. 15 (Nfld.).

Pollution

The Newfoundland and Labrador Water Authority has general control over the pollution of surface and ground waters in bodies of water within the province. One of the main functions of the Minister of Economic Development under the Water Resources and Pollution Control Act is to cooperate with officials representing other levels of government, including municipalities, in the prevention of water pollution.²⁹⁹ To control pollution, the Minister is given power to test and regulate the use of water and establish standards to determine when water is polluted.³⁰⁰ Regulations can also be passed requiring persons who have contaminated waters to clean them up at their own expense, and regulating the manner in which business, trades or industries that might cause pollution of water are carried on.³⁰¹ The Act also specifically prohibits the discharge or deposit of any material of any kind that might cause pollution into any well or body of water.³⁰² In addition, the Authority is empowered to define and prescribe an area surrounding any source of water supply, and when this is done the municipal authority, or the person operating the water works and using the water from the source, is required to give notice of the area so defined and prescribed, and protect the source of water from pollution by preventing bathing, swimming and washing in the water or the discharge of foreign elements into it.³⁰³

The Waters Protection Act of 1964³⁰⁴ is another general statute giving the Minister of Health general powers over all inland waters to protect them from becoming contaminated and to prevent their pollution. Since there seems to be a general overlapping of the powers granted by the Waters Protection Act and those under the Water Resources and Pollution Act, it should be kept in mind that the provisions of the Water Resources and Pollution Act and regulations passed pursuant to it are subject to the rights conferred on any municipal authority, person or company by or under the Ore Treatment Tailings Labrador Disposal Act of 1965, and any other statute or law.³⁰⁵ This would suggest that in case of conflict between the Waters Protection Act and the Water Resources and Pollution Control Act, the Water Protection Act would override. In any event, the Minister of Health, being a member of the advisory board to the Authority, would be in a position to coordinate the administration of the two Acts.

Under the Waters Protection Act of 1964, the Minister of Health may examine any waters, whether on private or public property, as well as the lands and buildings thereon, to take water samples.³⁰⁶ If any thing, condition or practice

299. 1966-7, No. 57, s. 18(a) (Nfld.). [Now the Minister of Mines, Agriculture and Resources under the Clean Air, Water and Soil Authority Act; see Addendum, p. 505. See also the Waste Material (Disposal) Act, discussed in the Addendum, at p. 506. See also the Pesticides Control Act, discussed in the Addendum, at p. 507].

300. *Ibid.*, s. 20(1)(a).

301. *Ibid.*, ss. 20(1)(k), (1).

302. *Ibid.*, s. 25.

303. *Ibid.*, s. 26.

304. 1964, No. 36 (Nfld.).

305. 1966-7, No. 57, s. 17(2) (Nfld.).

306. 1964, No. 36, s. 3 (Nfld.). [For a recent amendment see Addendum, p. 507].

is found in or upon the watershed or environment of any waters, which are, or reasonably may be expected to be used for drinking or domestic purposes, or for bathing, swimming or as ornamental waters, and it appears likely that the thing, condition or practice does or may lead to the contamination, infection or fouling of the water, the Minister may, by a written order, require the authority or person having control to remove or destroy such thing or avert or prevent such condition or desist from such practices.³⁰⁷ The Minister may also make regulations to prevent the contamination, infection or fouling of any waters. The Act does not define the term "waters" or "inland waters",³⁰⁸ but it does refer to inland waters standing, running or below ground, and there is also a specific reference to wilful or negligent damage to a well, spring or other domestic water supply, so the provisions of the Act appear to extend to all surface and ground waters. The Act also prohibits certain activities, such as constructing a house or farm building, establishing a cemetery or laying a sewer or providing for sewage disposal of any kind upon the watershed of any river or body of water from which the public supply of water for drinking and domestic purposes is drawn, without first obtaining the permission of the Minister.³⁰⁹ This seems to be a duplication in somewhat more specific terms of the provisions of the Water Resources and Pollution Control Act which prevents or restricts the pollution, discoloration or rendering unwholesome of bodies of water.³¹⁰

The Local Government Act also deals with pollution and gives the municipal authorities, subject to the approval of the Minister of Municipal Affairs and Housing or any other Minister of the Crown appointed by the Lieutenant-Governor in Council for the time being to administer the Act, and to the Waters Protection Act of 1964, the right to take possession of Crown lands and to acquire by purchase, expropriation or otherwise, private lands surrounding any of the waters to the extent of the watershed from which water for public purposes is obtained to prevent pollution.³¹¹ A similar provision is contained in the Water and Sewerage Corporation of Greater Corner Brook Act.³¹² In both these Acts, the term "water" is not specifically defined, and it is a matter of conjecture whether or not it would cover surface and ground waters, but it probably would to the extent that such waters are being used for purposes of domestic water supply.

Local councils are authorized under the Local Government Act³¹³ to prohibit the use of water for domestic purposes from any natural source that is suspected of being polluted, a provision that is markedly similar to that in the Water Resources and Pollution Control Act which permits the Minister to make regulations prohibiting, restricting and regulating the use of water from any specified body or bodies of water generally for household, industrial and commercial pur-

307. *Ibid.*, s. 4.

308. 1964, No. 36, s. 2 (Nfld.).

309. *Ibid.*, s. 6.

310. 1966-7, No. 57, s. 20(1)(d) (Nfld.).

311. 1966, No. 31, s. 69(c) (Nfld.).

312. 1951, No. 79, s. 35(1) (Nfld.).

313. 1966, No. 31, s. 91(1), (9) (Nfld.).

poses.³¹⁴ Presumably the Minister, acting in accordance with the Water Resources and Pollution Control Act, would cooperate with the local councils in controlling pollution within the municipality.

Pollution is also dealt with under the Department of Health Act of 1965,³¹⁵ which gives the Minister of Health power to pass regulations to prevent the pollution of lakes, rivers, streams, pools, springs and waters (which is not defined) so as to insure their sanitary condition. In addition the Urban and Rural Planning Act³¹⁶ provides for the creation by the Provincial Planning Board of a regional plan which may include proposals relating to the prevention of pollution of streams and bodies of water (a term that is not defined). Several special Acts also contain provisions relating to the pollution of waters, but contain no definition of the meaning of the word "waters", so that it is difficult to say whether they include surface and ground waters or merely water in established watercourses. For example, the City of Corner Brook Act³¹⁷ authorizes the city council to pass regulations to prevent the pollution of any waters under or outside the city limits by prohibiting the cutting of timber or the erection of buildings, and the Water and Sewerage Corporation of Greater Corner Brook Act³¹⁸ provides that regulations can be passed preventing the pollution of any lake, pond, river, source or fountain, or reservoir. Apart from specific reference to regulations controlling the digging of wells, it is difficult to determine what is meant by the term "waters" in these Acts.

Irrigation

The only statutory regulation of water used for irrigation purposes is found in the Water Resources and Pollution Control Act which empowers the Minister to make regulations prohibiting, restricting and regulating the use of water from any specified body of water for irrigation purposes.³¹⁹ The Minister is also given authority to set standards for water used for irrigation purposes and to require individuals to have a licence to use water from the specified bodies of water for irrigation purposes.³²⁰

314. 1966-7, No. 57, s. 20(1)(s) (Nfld.).

315. 1965, No. 32, as amended by 1966, No. 73 (Nfld.).

316. 1965, No. 28 (Nfld.).

317. 1968, No. 37, s. 155(8), (Nfld.), as amended.

318. 1951, No. 79 (Nfld.), as amended.

319. 1966-7, No. 57 s. 20(1)(b) (Nfld.). [See now the Clean Air, Water and Soil Authority Act, discussed in the Addendum, at pp. 505-6].

320. *Ibid.*, s. 20(1)(e).

PART VII
Coastal Waters

CHAPTER TWENTY-TWO

Coastal Waters at Common Law

By Gerard V. La Forest

GENERAL

The common law does not recognize a technical category of "coastal waters", and what is here referred to as coastal waters is the waters of the sea that wash the coast. The common law respecting such waters falls under a number of legal categories: the shore, tidal waters, inland waters and territorial waters. Much of the law respecting the shore and tidal waters has already been examined,¹ but a brief review of certain aspects will be made before proceeding to a discussion of inland and territorial waters.

PUBLIC RIGHTS

The major public rights of navigation and fishing, which apply to all tidal waters, have already been examined.² However, there appear to be other minor public rights in the waters of the sea. Thus the public has at common law the right to take seaweed floating on the sea.³ However, the public may not, as of right, enter to take seaweed from the shore.⁴ Though there is an early Prince Edward Island case in which there are *dicta* stating that, by analogy to the doctrine of accretion, the seaweed belongs to the riparian owner, whether or not he owns the shore,⁵ the better view is that seaweed belongs to the owner of the shore.⁶ The owner of the shore would have the right to erect a weir thereon to collect the seaweed.⁷ There is also some authority that the public has a right to bathe in the sea, but this gives it no right of passage on the shore, any such right being limited to what the public rights of navigation and fishing permit.⁸

RIPARIAN RIGHTS

The owner of land bounding on the sea has many of the same rights as a riparian owner on a river. Among these are the rights of access, accretion and drainage as well as the right to build bulwarks against the encroachments of the

1. See Chapters Seven to Ten.

2. See pp. 178-91, 195-9.

3. *Reg. v. Lord* (1864), 1 P.E.I. 245.

4. *Ibid.*

5. *Ibid.*

6. *Young v. McIsaac* (1897), 8 E.L.R. 245.

7. *Reg. v. Lord* (1864), 1 P.E.I. 245.

8. *Ibid.*

sea.⁹ As in the case of rivers, too, a person may make himself liable for a nuisance for polluting the waters of the sea.¹⁰ A person has, for example, no right to discharge sewage in the sea so as to cause a nuisance to another.¹¹

OWNERSHIP OF THE BED

The Shore

As already seen in dealing with tidal rivers, the *prima facie* rule is that a grant of land bounding the sea carries title down to high water mark. Unless expressly granted, the shore, i.e. the land between high and low water mark, remains in the Crown.¹² This means the Crown in right of the province, except where the land has been expressly conveyed to the Crown in right of the Dominion as in the case of public harbours.¹³ In both Newfoundland and Prince Edward Island steps were taken at an early period to make certain that the shores of these islands were retained for use by the public engaging in the fisheries. By a series of early statutes, the shores of Newfoundland were reserved for the use of the fisheries under the term "ship's room", but it is now clear that the Crown in right of Newfoundland may grant the shores of the province in the same way as other Crown lands.¹⁴ Nonetheless early grants of the shore could only be justified by statute. In Prince Edward Island the bulk at least of the original grants of land were made subject to a reservation (called the "fishery reserves") in favour of the Crown of "five hundred feet from high water mark on the coast of the tract of land . . . granted to erect stages and other necessary buildings for carrying on the fishery". This was held to apply solely on the open seas and its bays and inlets, and not to land fronting on rivers.¹⁵ The reserves appear to have been ignored over time, but in any event the lands forming the subject of these original grants were later purchased by the province,¹⁶ and no such reservation appears to have been made in subsequent grants. Accordingly these reservations would appear to be no longer extant.

The Seabed

General

The determination of the ownership of the seabed is, of course, important because of the possible value of the underlying mineral and other resources.¹⁷ It is also important in relation to water resources because it determines whether the provinces have any jurisdiction beyond low water mark, for the jurisdiction of a

9. See Chapter Nine.

10. *Suzuki v. Ionian Leader*, [1950] 3 D.L.R. 790.

11. *Hadden v. North Vancouver* (1922), 67 D.L.R. 669.

12. See Chapter Ten.

13. *Ibid.*

14. See *Rowe v. Street* (1820), 1 Nfld. L.R. 213; *R. v. Cuddihy* (1831) 2 Nfld. L.R. 8; affirmed: *Attorney-General v. Cuddihy* (1836), 1 Moo. P.C. 82; 12 E.R. 742; *R. v. Ryan* (1831), 2 Nfld. L.R. 47; affirmed: (1836), 1 Moo. P.C. 87; 12 E.R. 744; *Walbank v. Ellis* (1853), 2 Nfld. L.R. 188. The province's power to sell ships' room and other Crown lands was clearly spelled out by the Crown Lands Act, R.S.N., 1872, Tit. xiii, c. 45, s. 16, re-enacting (1844), 7 Vict., c. 1, s. 19 (Nfld.).

15. *Reg. v. Cox* (1858), 1 P.E.I. 170; this case contains a description of the fishery reserves.

16. The various Acts dealing with the Prince Edward Island land question are listed in R.S.P.E.I., 1951, vol. 2, p. ix.

17. For a more detailed discussion of this matter, see La Forest, *Natural Resources and Public Property Under the Canadian Constitution* (Toronto, 1969), Chapter Six.

province is limited to the provincial territory. If the provinces do not have jurisdiction, the federal Parliament has complete legislative jurisdiction. If they do, the federal Parliament has in any event jurisdiction over the matters provided for by section 91 of the British North America Act.

In order to discuss the ownership of the seabed it is necessary to distinguish between two categories of offshore waters: inland waters and territorial waters. Inland waters are waters so intimately associated with the territory of a state that, under international law, they are considered as much the territory of a state as dry land.¹⁸ The common law spoke of waters *intra fauces terrae*, but despite the terminological difference it seems to amount to the same thing. The inland waters off the Atlantic Provinces are extensive, and have been from pre-Confederation days. At Confederation they included, under general customary international law, all bays and straits, or parts thereof, capable of being enclosed by lines of six marine miles from shore to shore.¹⁹ Moreover historic claims could be made that all bays in these provinces, including in particular the large bays, Chaleurs, Conception, Fundy and Miramichi, were inland bays.²⁰

Territorial waters consist of a belt of water stretching seaward from low water mark or the outer edge of inland waters, and though Canada has recently extended the width of the belt to a distance of twelve marine miles,²¹ any claim by the province would be limited to the three mile limit existing at Union.

Inland Waters

Under English law, inland waters appear to be considered as forming part of the adjoining county.²² This may well be the law in Canada, for the common law applies subject to the situation and conditions of this country. Support for this view may be found in the fact that some of the provinces are defined as including certain inland waters. The boundary between Nova Scotia and New Brunswick is drawn across the middle of the Bay of Fundy,²³ and the Quebec-New Brunswick boundary runs in the middle of the Bay des Chaleurs.²⁴ It is clear, of course, that waters expressly falling within the boundaries of a province continued to belong to that province at Union.²⁵ Section 7 of the British North America Act expressly provides for the continuation of the pre-existing boundaries of New Brunswick and Nova Scotia. The Newfoundland Terms of Union also continue the pre-existing boundaries of that province, and the same is inherent in the Prince Edward Island Terms of Union.

18. See C. J. Colombos, *The International Law of the Sea*, 5th ed. (London, 1962), pp. 78-9; see the Geneva Convention on the Territorial Sea and the Contiguous Zone, art. 5 where this is recognized: U.N. Doc. A/Conf. 13/L. 52.

19. See Oppenheim, *International Law*, 8th ed. by Lauterpacht (London, 1955), pp. 505 *et seq.*, pp. 510 *et seq.*

20. See La Forest, "Inland Waters of the Atlantic Provinces and the Bay of Fundy Incident" (1963), 1 Can. Yearbook Int. Law 149.

21. Territorial Sea and Fishing Zones Act, (1964), 13 Eliz. II, c. 22, ss. 3, 4 as amended by (1970), 18 & 19 Eliz. II, c. 68 (Can.).

22. See *Reg v. Cunningham* (1859), Bell's C.C. 72; *Direct United States Cable Co. v. Anglo-American Telegraph Co.* (1876-7), 2 A.C. 394; *The Fagernes*, [1927] P. 311; *Re Dominion Coal Co. and County of Cape Breton* (1963), 40 D.L.R. (2d) 593.

23. See *Re: Offshore Mineral Rights of British Columbia*, Case, p. 23; Can. Sess. Pap., 1883, No. 70, p. 47.

24. (1851), 44 & 45 Vict., c. 63 (Imp.).

25. *Mowat v. McPhee* (1880), 5 S.C.R. 66; *R. v. Burt* (1932), 5 M.P.R. 112; *Re: Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792.

But apart from the Bay of Fundy and the Bay des Chaleurs, there is no provision in the boundaries of the Atlantic Provinces expressly including other inland waters. There are, however, some general terms in the proclamations establishing the Maritime Provinces that may be construed as including inland waters. The Nova Scotia and New Brunswick proclamations include within the description of those provinces "all the rights, members and appurtenances thereunto belonging";²⁶ the description of Prince Edward Island includes the "Territories adjacent thereto . . . which are . . . dependant thereupon".²⁷

Further support for the view that all adjacent inland bays form part of the Atlantic Provinces may be found in the fact that the provinces before Confederation frequently acted on this assumption. New Brunswick treated Miramichi Bay as part of Northumberland County²⁸ and it also exercised jurisdiction over Passamaquoddy Bay.²⁹ In fact, all four provinces exercised jurisdiction over all bays for fisheries³⁰ and, in Newfoundland, customs purposes.³¹

If the theory that all inland waters adjacent to a province form part of the adjoining county is correct, it follows that the inland waters off the Atlantic Provinces belong to those provinces, for the Privy Council has held that whatever belonged to the provinces at Union continues to do so unless expressly granted.³² As already seen these inland waters appear to have included all the bays adjacent to these provinces.

There is, however, support for another theory: that the colonies were entitled to jurisdiction over inland waters only to the extent that such waters had been delegated to them by the British Crown. This theory receives some support from the approach in the reference *Re: Offshore Mineral Rights of British Columbia*.³³ Even under this theory the Bay des Chaleurs³⁴ and the Bay of Fundy belong to the adjacent provinces. So would Conception Bay,³⁵ because Newfoundland was recognized by British statutes as having jurisdiction over that bay.³⁶ The same would be true of any bay so recognized. In fact there is authority that it is sufficient that the colony exercised legislative jurisdiction over adjacent areas even without express delegation.³⁷ Certainly Canada's claim that Miramichi Bay is an inland water is based on the pre-Confederation jurisdiction of New Brunswick over that bay already adverted to. Nowadays, it would be unnecessary for Canada

26. *Re: Offshore Mineral Rights of British Columbia*, Case, p. 23; Can. Sess. Pap., 1883, No. 70, p. 2.

27. Can. Sess. Pap., 1883, No. 70, p. 2.

28. (1799), 39 Geo. III, c. 5; (1810), 50 Geo. III, c. 5; (1823), 5 Geo. IV, c. 23; (1829), 9 & 10 Geo. IV, c. 3; (1834), 4 Wm. IV, c. 31 (N.B.).

29. (1835), 5 Wm. IV, c. 41 (N.B.).

30. (1836), 6 Wm. IV, c. 8 (N.S.); (1843), 6 Vict., c. IV (P.E.I.); (1853), 16 Vict., c. 69 (N.B.); (1893), 56 Vict., c. 6 (Nfld.). See La Forest "Inland Waters of the Atlantic Provinces and the Bay of Fundy Incident" (1963), 1 Can. Yearbook Int. Law 149.

31. (1898), 61 Vict., c. 13 (Nfld.).

32. *Attorney-General of Canada v. Attorney-General of Ontario*, [1898] A.C. 700.

33. [1967] S.C.R. 792; see also *Direct United States Cable Co. v. Anglo-American Telegraph Co.* (1876-7), 2 A.C. 394, which supports both theories and *Re Dominion Coal Co. and County of Cape Breton* (1963), 40 D.L.R. (2d) 693, per MacDonald J. (the other judges, however, rely on the first theory above).

34. *Mowat v. McPhee* (1880), 5 S.C.R. 66.

35. *R. v. Burt* (1932), 5 M.P.R. 112; see also *Re: Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792.

36. *Direct United States Cable Co. v. Anglo-American Telegraph Co.* (1876-7), 2 A.C. 394.

37. *Re Dominion Coal Co. and County of Cape Breton* (1963), 40 D.L.R. (2d) 593; see also *R. v. The "John J. Fallon"* (1916), 16 Ex. C.R. 332.

to rely on historic title in respect of that bay or the Bay des Chaleurs because all bays up to the point where they exceed twenty-four marine miles in width are inland waters.³⁸

It should be added that even where inland waters belong to a province, there is an exception in the case of public harbours which were transferred to the Dominion by the combined effect of section 108 and the Third Schedule to the British North America Act.

Finally, it should be mentioned that whichever body owns an inland water, whether the Dominion or the province, it may expressly convey it to the other or, for that matter, to private individuals or organizations.

Territorial Waters

The leading case on the conflicting claims of the Dominion and the provinces to the ownership of the bed of the territorial sea is the reference *Re: Offshore Mineral Rights of British Columbia*.³⁹ In that case the Supreme Court of Canada held that Canada owned, had power to exploit, and had legislative jurisdiction over the subsoil, including the minerals and natural resources, of the territorial sea off the coasts and islands of British Columbia. That province, in its view, ended at low water mark and so could have no property in, or jurisdiction over, the territorial sea.

In British Columbia, however, there was no historical evidence of any exercise of jurisdiction over the territorial sea by the province before Confederation. This may afford a ground for distinguishing the situation of that province from that of the Atlantic Provinces where there were for many years before Confederation exercises of jurisdiction over the territorial sea by all four provinces. For in the reference the court noted:

We are not disputing the proposition that while British Columbia was a Crown Colony the British Crown might have conferred upon the Governor or the Legislature of the colony rights to which the British Crown was entitled under international law but the historical record of the colony does not disclose any such action.⁴⁰

The historical case supporting provincial jurisdiction over the territorial sea by the Atlantic Provinces may be briefly set out. First of all, as already mentioned, Nova Scotia and New Brunswick are described in the commissions establishing them as including "all Rights, Members, and Appurtenances whatsoever thereunto belonging"⁴¹ and Prince Edward Island is said to include "the territories adjacent thereto".⁴² In this context it is well to note that the territorial sea is often described as an appurtenance.⁴³

That these provinces were considered as having jurisdiction over the adjacent sea is evident from the many pre-Confederation exercises of jurisdiction by these

38. Geneva Convention on the Territorial Sea and the Contiguous Zone, art. 7(5); U.N. Doc. A/Conf. 13/L. 52.

39. [1967] S.C.R. 792.

40. *Ibid.*, at p. 808.

41. *Re: Offshore Mineral Rights of British Columbia*, Case, p. 23; Can. Sess. Pap., 1883, No. 70, p. 47.

42. Can. Sess. Pap., 1883, No. 70, p. 2.

43. See, for example, *The Ship "North" v. R.* (1906), 37 S.C.R. 385, at p. 401; *Anglo-Norwegian Fisheries Case* (1951), I.C.J. Rep. 112, at p. 128.

provinces.⁴⁴ Particular examples begin in 1770 when Nova Scotia enacted a statute prohibiting the dumping of certain deleterious material into the sea within three leagues of the provincial coast.⁴⁵ Again mining leases under the sea off Cape Breton were issued before Confederation.⁴⁶ A more general exercise of jurisdiction took place with the enactment of the "hovering Acts" by Nova Scotia, in 1836, Prince Edward Island, in 1843, New Brunswick, in 1853, and Newfoundland in 1893.⁴⁷ The Acts authorized seizure and forfeiture of any ships found fishing within three miles of the coast or bays and ports. Some of these statutes were expressly approved by the British Crown by orders in council.⁴⁸ Newfoundland, from an early period, also exercised customs jurisdiction over the three mile belt.⁴⁹ Newfoundland's experience is, of course, relevant until its entry into Confederation in 1949. Among the statutes of that province that should be noted are the Crown Lands Act, 1930, dealing with mining locations under the sea.⁵⁰ And the Oyster Fisheries Act has long controlled that industry on the "banks" of the province.⁵¹ If the territorial sea fell within the provinces before Confederation the effect of section 109 of the British North America Act is to retain the property therein in the provinces.⁵²

Considerable judicial authority also favours the view that the jurisdiction of the Atlantic Provinces extended to the three mile limit. This view was expressly stated by Hoyles C. J. of the Supreme Court of Newfoundland (Haywood J. concurring) in *Anglo-American Telegraph Co. v. Direct United States Cable Co.*⁵³ in 1875, and that court repeated the view in *Rhodes v. Fairweather*⁵⁴ in 1888 and *The Queen v. Delepine*⁵⁵ in 1889.

In New Brunswick, too, the same approach was expressed in *R. v. Burt*⁵⁶ in 1932 and *Filion v. New Brunswick International Paper Co.*⁵⁷ in 1935 by the Appeal Division of the Supreme Court. In the former case, the court upheld a conviction of having intoxicating liquor in the province although the offence occurred on board ship in the Bay of Fundy within three miles of the coast. It is true that the Supreme Court of Canada in the reference *Re: Offshore Mineral Rights of British Columbia* looked on *R. v. Burt* as dealing with inland waters, but the judgment was based on alternate grounds and, indeed, the court relied more firmly on the ground that the three mile belt came within the province. And the view was repeated a few years later in the *Filion* case.

44. In addition to those referred to in the text, see the many statutes reproduced in *Proceedings in the North Atlantic Fisheries Arbitration*, 1910 (Washington, 1912), vol. V. Appendix to the Case of Great Britain, Part III.

45. (1770), 10 Geo. III, c. 10 (N.S.).

46. See *Re: Offshore Mineral Rights of British Columbia*, Case, pp. 425-6.

47. (1836), 6 Wm. IV, c. 8 (N.S.); (1843), 6 Vict., c. 14 (P.E.I.); (1853), 16 Vict., c. 69 (N.B.); (1893), 56 Vict., c. 6 (Nfld.); see La Forest, "Inland Waters of the Atlantic Provinces and the Bay of Fundy Incident" (1963), 1 Can. Yearbook Int. Law 149.

48. See *Proceedings in the North Atlantic Fisheries Arbitration*, 1910 (Washington, 1912), vol. V, Appendix to the Case of Great Britain, pp. 962, 963, 1055.

49. (1898), 61 Vict., c. 13 (Nfld.).

50. (1930), 21 Geo. V, c. 15 (Nfld.).

51. C.S.N., 1916, c. 165.

52. *Attorney-General of Canada v. Attorney-General of Ontario*, [1898] A.C. 700.

53. (1875), 6 Nfld. L.R. 28, 52 at pp. 33, 55.

54. (1888), 7 Nfld. L.R. 321.

55. (1889), 7 Nfld. L.R. 378.

56. (1932), 5 M.P.R. 112.

57. (1934), 8 M.P.R. 89.

In Prince Edward Island, however, the Supreme Court in *Gavin v. The Queen*⁵⁸ in 1956 followed *Reg. v. Keyn*,⁵⁹ the English case relied on by the Supreme Court of Canada in the reference *Re: Offshore Mineral Rights of British Columbia* in holding that the realm ended at low water mark. And MacDonald J. of the Nova Scotia Supreme Court expressed a similar view in 1963 in *Re Dominion Coal Co. Ltd. and County of Cape Breton*.⁶⁰ However, Currie J. in the same case, relying on the exercises of jurisdiction by the province before Confederation, thought the control and administration of the territorial waters off Nova Scotia vested in the province.

It should also be noted that the Supreme Court of Canada in *Re: Offshore Mineral Rights of British Columbia*⁶¹ indicated that jurisdiction over the territorial sea by Canada before it became sovereign was of a limited character; it appeared to treat complete jurisdiction as an attribute of international sovereignty. This could be interpreted as denying any provincial claim, for such sovereignty vests in the Dominion alone. Newfoundland could on this ground, however, argue that the territorial sea belonged to it before Union because it had achieved Dominion status.

The question of the ownership of the subsoil of the territorial sea off the Atlantic Provinces cannot, therefore, be regarded as settled. Assuming these provinces owned the subsoil of the territorial sea, their right to exploit them would be subject to federal legislative power over defence, navigation and other matters falling within section 91 of the British North America Act.⁶² Moreover, the federal government could determine the boundary with foreign countries by treaty, for such treaties affecting sovereignty are self-implementing.⁶³

58. (1956), 3 D.L.R. (2d) 547.

59. (1876), 2 Ex. D. 63.

60. (1963), 60 D.L.R. (2d) 593.

61. [1967] S.C.R. 792, at pp. 815-6.

62. See *Underwater Gas Developers Ltd. v. Ontario Labour Relations Board* (1960), 21 D.L.R. (2d) 345.

63. *Francis v. The Queen*, [1956] S.C.R. 618, per Rand and Cartwright JJ.

CHAPTER TWENTY-THREE

Statutes Respecting Coastal Waters*

FEDERAL STATUTES

General

The legislative provisions of the Parliament of Canada relating to the use and development of coastal waters (for purposes other than shipping and fishing) mainly concern (a) freedom from nuisance and obstruction in its major harbours, and (b) the control of pollution from vessels navigating in coastal waters. However, a few other general provisions will be discussed briefly.

Nuisances and Obstructions in Public Harbours

The National Harbours Board Act¹ provides that, notwithstanding the Navigable Waters Protection Act, an application for the construction of any work in navigable waters under the jurisdiction of the National Harbours Board, together with plans and descriptions, must be deposited with the Minister of Transport, as well as the Minister of Public Works, and that the approval of the Governor in Council rests on the joint recommendation of the two Ministers.² The National Harbours Board Act provides, as well, that the Governor in Council may make by-laws regulating and controlling matters in connection with vessels navigating harbours covered by the Act;³ pursuant to this power, regulations have been passed that prohibit any person to cause or do or omit to do anything that may cause an encumbrance of the water or shore of a harbour or an obstruction or danger to navigation in a harbour.⁴ Regulations further prohibit persons from throwing, draining or discharging into harbour waters, or depositing within harbour limits, matters that might damage vessels or property or cause a nuisance or endanger life or health, except in places designated by the Board.⁵ The Board is empowered to remove, at the expense of the offender, any encumbrance, obstruction, nuisance or other cause of danger or damage created in breach of these

*The federal, New Brunswick and Prince Edward Island material was written by Alan D. Reid; the Nova Scotia material by a team under W. A. MacKay, revised by G. V. La Forest and Lucille Kerr; the Newfoundland material by G. V. La Forest and W. R. Charles.

1. R.S.C., 1970, c. N-8.

2. *Ibid.*, s. 37. This would seem to be somewhat out of place in view of the amendment to the Navigable Waters Protection Act replacing the Minister of Public Works with the Minister of Transport as the Minister responsible for that Act: see (1968-9), 17 & 18 Eliz. II, c. 15, s. 1 (Can.), now R.S.C., 1970, c. N-19, s. 2. One would have expected s. 37 of the National Harbours Board Act to have been amended to reflect that change.

3. *Ibid.*, s. 14(1)(a).

4. SOR Consolidation, 1955, Vol. 3, p. 2252, s. 4(1).

5. *Ibid.*, s. 4(2).

provisions.⁶ The regulations further prescribe that all works in a harbour, whether new or old, that might be a hazard, must be reported in writing to the Board and clearly marked.⁷ Another regulation prohibits vessels from engaging in dredging or removing obstructions in harbours without the prior permission of the Board.⁸

Pollution by Vessels

Regulations under the Canada Shipping Act⁹ implement the International Convention for the Prevention of Pollution of the Sea by Oil. The regulations purport to control the discharge of oil from ships of every nationality carrying oil as fuel or cargo in the territorial sea and internal waters of Canada¹⁰ and, in the case of Canadian ships in excess of five hundred tons¹¹ and tankers over one hundred and fifty tons,¹² in designated non-Canadian waters.¹³

The regulations provide, as a general rule, that no person is to discharge into these waters any oil or oily mixture that fouls the surface of the sea.¹⁴ The discharge of a mixture into the sea containing one hundred parts or more of oil in a million parts of the mixture is deemed to foul the surface.¹⁵ Exceptions are provided, however, where a person discharges from the bilges of a ship a mixture containing no oil other than lubricating oil that has not been used in the crankcase of a diesel engine,¹⁶ where he discharges or allows oil or an oily mixture to escape for the purpose of securing the safety of the ship or saving life,¹⁷ and where he allows the escape of oil by reason of damage or unavoidable leakage, if all reasonable precautions have been taken after the occurrence of the damage or discovery of the leakage so as to prevent or minimize its escape.¹⁸ The regulations further require that all ships operating in Canadian waters carrying oil as a fuel or cargo must carry an oil record book,¹⁹ and that Canadian ships must be fitted so as to prevent oil from leaking or draining into the bilges,²⁰ and with means to ensure that oil in the bilges is not discharged in contravention of the regulations.²¹ Extensive enforcement provisions are laid out as well, attaching liability to the owner and master of the ship as well as to the person directly responsible for the discharge or escape.

In addition, a recent amendment to the Canada Shipping Act empowers the Minister of Transport to order the destruction or removal of a distressed, stranded, wrecked, sunk or abandoned vessel, its cargo or fuel, where he has reasonable

6. *Ibid.*, s. 4(3).

7. *Ibid.*, s. 5.

8. *Ibid.*, s. 83.

9. R.S.C., 1970, c. S-9 [Pollution control under this Act is now governed by a new Part XX; see Addendum, pp. 484-92. See also the Arctic Waters Pollution Prevention Act, discussed in the Addendum, at pp. 492-3].

10. SOR/68-434, s. 2(1)(a) (Can.).

11. *Ibid.*, s. 7(b).

12. *Ibid.*, s. 7(a).

13. *Ibid.*, s. 8(1), Schedule A.

14. *Ibid.*, ss. 4, 8(1).

15. *Ibid.*, s. 2(1)(g).

16. *Ibid.*, ss. 6(1)(c), 9(1)(d).

17. *Ibid.*, ss. 6(1)(a), 9(1)(a).

18. *Ibid.*, ss. 6(1)(b), 9(1)(b).

19. *Ibid.*, ss. 10(2), (3).

20. *Ibid.*, s. 12(a).

21. *Ibid.*, s. 12(b).

cause to believe that it is polluting or is likely to pollute Canadian waters, constitutes or is likely to constitute a danger to waterfowl or marine life, or is damaging or is likely to damage coastal property or interfere with its enjoyment.²²

Pollution of Fisheries

The Fisheries Act²³ contains anti-pollution provisions which have been briefly discussed in Chapter Eleven. These would also seem to be applicable to coastal waters.

Marshlands

A further relevant matter is the federal legislation respecting marshlands. The Maritime Marshland Rehabilitation Act²⁴ provides that the Minister of Agriculture may, for the reclamation and development of marshlands in the provinces of Nova Scotia, New Brunswick and Prince Edward Island, construct, or assist the provinces in the construction of dykes, aboiteaux and breakwaters.²⁵ This has already been dealt with in more detail in Chapter Twenty-one.²⁶

Marine Plants

Proposed amendments²⁷ to the Fisheries Act provide that the Governor in Council may make regulations prohibiting anyone without a licence from harvesting marine plants in the coastal waters of Canada specified by regulations,²⁸ and specifying periods during which no harvesting may take place.²⁹ "Coastal waters of Canada" is defined to mean waters in the fishing zones of Canada, waters in the Canadian territorial sea, and all internal waters of Canada lying outside the geographical boundaries of a province.³⁰ "Marine plants" is also defined.³¹ Where such regulations are in effect, it will be an offence to harvest marine plants in coastal waters in contravention of the regulations,³² unless one takes advantage of the provisions enabling one to apply to the Minister of Fisheries for a licence.³³

NEW BRUNSWICK STATUTES

There are a number of New Brunswick statutes pertaining to coastal waters. Shore strips vested in the Crown are protected by a section of the Crown Lands Act³⁴ prohibiting persons from taking, using, removing or carrying away from Crown lands any property thereon belonging to the Crown, without licence from the Minister of Natural Resources or other legal authority.³⁵ Crown lands are defined as "such Crown or public lands or Crown domain as are within, and belong to Her Majesty in the right of, the Province, and whether or not any water flow

22. R.S.C., 1970, c. S-9, s. 485.

23. R.S.C., 1970, c. F-14.

24. R.S.C., 1970, c. M-4.

25. *Ibid.*, s. 3.

26. See p. 435.

27. R.S.C., 1970, 1st Supp., c. 17.

28. S. 34.3, as enacted by *ibid.*, s. 5.

29. *Ibid.*, s. 34.3(b).

30. *Ibid.*, s. 34.4(c).

31. *Ibid.*, s. 34.4(c).

32. *Ibid.*, s. 34.1.

33. *Ibid.*, s. 34.2.

34. R.S.N.B., 1952, c. 53.

35. *Ibid.*, s. 23.

over or cover the same".³⁶ The Act further contemplates the leasing of these lands for such purposes as may be deemed advisable by the Minister.³⁷

Again, the Highway Act³⁸ provides that the Minister of Highways, by himself, his engineers, agents or workmen may take and carry away from the seashore, or from the shore or beach of any bay, harbour or strait, gravel, rock, sand or other material for the construction or repair of a highway.³⁹

The pollution of coastal waters falls within the jurisdiction of the New Brunswick Water Authority by virtue of the Water Act,⁴⁰ at least insofar as the constitutional jurisdiction of the province extends over these waters.⁴¹ The Act gives the Authority control over "pollution originating within the jurisdiction of the Province",⁴² and over the use of "shore waters".⁴³ This term is not defined, but the control given the Authority may well be interpreted as empowering it to interfere with the common law rights of riparian owners along the sea. This, again, raises the problem of interpreting the word "control", already discussed in dealing with similar powers relating to surface and ground water.⁴⁴

Marshlands could logically be discussed in connection with coastal waters; the definition "land lying upon the sea coast or upon the bank of a tidal river and being below the level of the highest tide"⁴⁵ supports this classification. The Marshland Reclamation Act⁴⁶ is, therefore, relevant in this context. However, the matter has already been discussed in connection with surface water.⁴⁷

A fisheries aspect of the use of tidal waters is raised in an Act to Provide Compensation for Fisheries Affected by Tidal Power Projects.⁴⁸ This Act provides that, notwithstanding any other Act, the Lieutenant-Governor in Council may not grant or lease Crown lands or rights connected with Crown lands for the purpose of generating tidal power until a sufficient sum has been paid by the sponsors of the project to a commission appointed by the Lieutenant-Governor in Council.⁴⁹ This sum is to be used by the commission to provide compensation to fishing interests in the province that are interfered with or destroyed by the construction or operation of tidal power works.⁵⁰ The term "fishing interests in the province" is defined as persons resident, or companies having a business office, in the province who engage in fishing⁵¹ (which, in turn, is defined as the catching of fish in the tidal waters of the province, or the canning, packing or processing of fish).⁵²

Mention must be made of the Oyster Fisheries Act,⁵³ which provides a structure for the leasing, by the Lieutenant-Governor in Council, of the beds of bays,

36. *Ibid.*, s. 1(b).

37. *Ibid.*, s. 65(1), as enacted by (1959), 8 Eliz. II, c. 39, s. 3 (N.B.).

38. (1968), 17 Eliz. II, c. 5 (N.B.).

39. *Ibid.*, s. 26(1)(c).

40. (1960-1), 9 & 10 Eliz. II, c. 19 (N.B.). [For recent amendments, see Addendum, p. 406].

41. See, generally, Chapter One.

42. (1960-1), 9 & 10 Eliz. II, c. 19, s. 4(c) (N.B.).

43. *Ibid.*, s. 4(a). [See now also the Clean Environment Act, discussed in the Addendum, at pp. 493-6.]

44. See Chapter Twenty-one at pp. 436-7.

45. R.S.N.B., 1952, c. 141, s. 1(d).

46. R.S.N.B., 1952, c. 141.

47. See Chapter Twenty-one at pp. 439-40.

48. (1960), 9 Eliz. II, c. 5 (N.B.).

49. *Ibid.*, s. 2.

50. *Ibid.*, s. 3.

51. *Ibid.*, s. 1(b).

52. *Ibid.*, s. 1(a).

53. R.S.N.B., 1952, c. 165.

rivers, harbours and creeks of the province for the purpose of cultivating oysters. The Act gives priority to applications by riparian owners desirous of leasing the bottom in front of their own foreshores,⁵⁴ and further provides that oysters produced on such lands are the personal property of the lessee.⁵⁵ The Act also stipulates that the Minister of Natural Resources may enter into agreements with the Minister of Fisheries for Canada to bring about a greater development of the oyster fisheries of the province⁵⁶ and that the Lieutenant-Governor in Council may transfer the oyster fisheries to Canada, in whole or in part, if satisfied that this would result in their more effective development.⁵⁷

Finally, reference should be made to the recently enacted Irish Moss Act⁵⁸ which authorizes the Minister of Fisheries,⁵⁹ with the approval of the Lieutenant-Governor in Council, to issue licences to harvest Irish Moss from land lying under tidal water and extending seaward from mean high water mark, including the foreshore, within certain coastal areas designated in the Act.⁶⁰ Licences may be issued for periods of up to ten years,⁶¹ and where a licence is in effect for an area it is an offence for any person, other than the licensee, to harvest Irish Moss in that area unless the harvester sells it to the licensee.⁶² The Act sets out the procedure for obtaining licences⁶³ and further provides that the Lieutenant-Governor in Council may make regulations exempting from the application of the Act certain classes of persons who harvest Irish Moss for agricultural or scientific purposes and not for processing or sale,⁶⁴ providing for the method of harvesting Irish Moss⁶⁵ and for its conservation,⁶⁶ respecting the duration of licences,⁶⁷ their terms, conditions⁶⁸ and cost,⁶⁹ and providing for their revocation.⁷⁰

PRINCE EDWARD ISLAND STATUTES

Among the statutes of Prince Edward Island relating to coastal waters is an Act passed in 1862 under which the legislature, to encourage commercial enterprise in the Island, undertook to authorize the Lieutenant-Governor in Council to

54. *Ibid.*, s. 4.

55. *Ibid.*, s. 5.

56. *Ibid.*, s. 7.

57. *Ibid.*, s. 8. A number of such transfers have taken place: transfer of oyster fisheries of Shediac Bay and Shediac Harbour in Westmorland County to federal government, subject to terms and conditions, Feb. 8, 1932; transfer of administration of oyster and other mollusc beds in Gloucester County to federal government, April 6, 1944; transfer of administration of oyster and other mollusc beds in Northumberland County to federal government, April 11, 1958.

58. (1969), 18 Eliz. II, c. 10 (N.B.).

59. *Ibid.*, s. 2(b).

60. *Ibid.*, s. 3(1). In general terms the areas comprise the coastline: between the N.B.-U.S. border in Charlotte County and Cape Spencer in Saint John County; around the Fundy Isles; between Cape Spencer and the N.B.-N.S. border in Westmorland County; between Baie Verte, in Westmorland County and Chatham, in Northumberland County; between Douglastown, in Northumberland County and Miscou Point, in Gloucester County; between Miscou Point and Bathurst, in Gloucester County; between Bathurst and Tidehead, in Restigouche County.

61. *Ibid.*, s. 5.

62. *Ibid.*, s. 4(b).

63. *Ibid.*, ss. 6-7.

64. *Ibid.*, s. 8(a).

65. *Ibid.*, s. 8(b).

66. *Ibid.*, s. 8(c).

67. *Ibid.*, s. 8(e).

68. *Ibid.*, s. 8(f).

69. *Ibid.*, s. 8(g).

70. *Ibid.*, s. 8(h).

grant parts of the hitherto ungranted sea shore of the Island to any corporation, public company or private persons in any estate or for any term, subject to whatever restrictions the Lieutenant-Governor in Council deemed just and reasonable.⁷¹ Such a grant, however, was conditional on the consent of the owner or owners of land in front of, or abutting the parcel of shore.⁷² The Act further reserved to the government the power to impose upon a grantee or lessee of any of the coasts or shores any conditions deemed necessary to protect the rights of the public in any highway along the shore.⁷³ Finally, the Act specifically exempted from its provisions the rights of persons in respect of the controversial fishery reserves, which were the subject of a commission report the previous year.⁷⁴ It would appear, then, that the intent of the Act was to grant private interests in the shore from high water mark seaward; certainly this was so in the case of bay shores.⁷⁵ While the Act has since been repealed,⁷⁶ grants of shore made under it would be unaffected by the repeal.

More recently, in 1969, the legislature enacted the Recreation Development Act.⁷⁷ Under this Act the Lieutenant-Governor in Council, on the recommendation of the Minister directed to administer the Act, may designate areas of land lying under tidal water or adjacent to such land as protected beaches.⁷⁸ These areas may include land extending seaward from mean high water mark and any adjacent land, whether covered with water or not, necessary for the adequate protection of beaches.⁷⁹ A procedure is set out for designation,⁸⁰ and, on designation, it is an offence to wilfully take or remove any sand, gravel or stone from a protected beach without the Minister's permission,⁸¹ or to deface a beach⁸² or deposit litter on it⁸³ or to use a beach contrary to regulations made under the Act.⁸⁴ Persons who, but for the Act, would lawfully be in a position to remove sand and other material from a designated area may apply to the Minister for permission to do so.⁸⁵

Jurisdiction over coastal waters might possibly be exercised by the Prince Edward Island Water Authority under the provisions of the Water Authority Act⁸⁶ which purports to vest control in the Authority over shore waters,⁸⁷ and over pollution originating in the province.⁸⁸ The observations made in discussing the identical provisions of the New Brunswick Act are pertinent here as well.⁸⁹

71. (1862), 25 Vict., c. 19, s. 1 (P.E.I.).

72. *Ibid.*, ss. 2, 3.

73. *Ibid.*, s. 4.

74. *Ibid.*, s. 5.

75. See (1871), 34 Vict., c. 17, ss. 5, 6 (P.E.I.).

76. R.S.P.E.I., 1951, Vol. 2, Schedule, Part 2.

77. (1969), 18 Eliz. II, c. 45 (P.E.I.).

78. *Ibid.*, s. 7(1)(c).

79. *Ibid.*, s. 7(2).

80. *Ibid.*, s. 8.

81. *Ibid.*, s. 12(a).

82. *Ibid.*, s. 12(b).

83. *Ibid.*, 12(c).

84. *Ibid.*, s. 13.

85. *Ibid.*, s. 14.

86. (1965), 14 Eliz. II, c. 19 (P.E.I.). [This Act has now been repealed and replaced by the Environmental Control Commission Act; see Addendum, pp. 498-502.].

87. *Ibid.*, s. 14(a).

88. *Ibid.*, s. 14(c).

89. See pp. 436-7, 472.

Another statute having some bearing on coastal waters is the Oil, Natural Gas and Minerals Act⁹⁰ which purports to vest all oil and gas under the territorial waters of the province in Her Majesty in the right of Prince Edward Island,⁹¹ and authorizes the issuing of licences and leases in respect of these resources.⁹² By virtue of regulations made under the Act,⁹³ licences may be applied for in relation to oil and gas under territorial waters. The Act, of course, raises the constitutional problems respecting territorial waters, already discussed.⁹⁴

A further statute of interest is an 1872 Act intended to define the law with regard to the right of persons to gather and collect seaweed and kelp cast upon, or floating about the sea coast and outside shores of the Island between high and low water mark.⁹⁵ This Act prescribed that all seaweed and kelp was public property, so that any person might lawfully gather up and take away any seaweed and kelp located between ordinary high and low water mark.⁹⁶ The Act did not apply, however, to any of the shores of the bays and rivers, nor to any persons, or the property of any persons, holding grants from the Crown to low water mark.⁹⁷ The operation of the Act was limited to two years from its enactment⁹⁸ and would no longer appear to have legislative effect. It is interesting to note, however, that the Act was still indexed as late as the 1951 revision of the Statutes of Prince Edward Island,⁹⁹ and in view of its specific purpose to define rather than change the law, may still be of some value in establishing the common law position.

Rights to use the bed of provincial waterways for oyster fisheries are conferred by legislation passed in 1906¹⁰⁰ providing for the leasing or granting of areas or plots in the bottom of the bays, rivers, harbours and creeks of the Island for the purpose of cultivating oysters and other shell fish. The Act authorizes the Lieutenant-Governor in Council to survey the beds or bottoms of the bays, rivers, harbours and creeks of the province, to designate areas which seem proper for cultivating shell fish, and to grant leases for the purpose.¹⁰¹ Priority is given to the owners of land abutting on the beds.¹⁰² Leases are subject to an annual rental or other consideration,¹⁰³ and are renewable.¹⁰⁴ Oysters planted on such beds become the personal property of the lessee. Leases are not given for live oyster, mussel mud, or quahaug beds except by special order of the Lieutenant-Governor in Council.¹⁰⁵

90. (1957), 6 Eliz. II, c. 24 (P.E.I.). [This Act has now been repealed and re-enacted; see Addendum, p. 504.].

91. *Ibid.*, s. 28.

92. *Ibid.*, ss. 2-5.

93. Made May 12, 1958, ss. 1(o), 2.

94. See Chapter Twenty-two, at pp. 463-8., and also, generally, Chapter One.

95. (1872), 35 Vict., c. 16 (P.E.I.). [See now the recently enacted Sea Plants Act, discussed in the Addendum, at p. 503.].

96. *Ibid.*, s. 1.

97. *Ibid.*

98. *Ibid.*, s. 2.

99. R.S.P.E.I., 1951, Index, p. 197; Schedule, Part 3, section 6 (Vol. 2).

100. (1906), 6 Edw. VII, c. 2 (P.E.I.).

101. *Ibid.*, s. 2.

102. *Ibid.*, ss. 4, 9.

103. *Ibid.*, s. 10.

104. *Ibid.*, s. 11, as amended by (1912), 11 Geo. V, s. 5 (P.E.I.).

105. *Ibid.*, s. 16.

NOVA SCOTIA STATUTES

Many of the Nova Scotia statutes dealing with coastal waters are concerned with the shores surrounding the province. The Beaches and Foreshores Act¹⁰⁶ authorizes the Lieutenant-Governor in Council to grant or lease, to any person who has applied in writing to the Minister of Lands and Forests, a part of any ungranted beach or foreshore upon the coast of the province or enter into a lease for such purpose. It also provides that if any person wishes to cultivate oysters upon any beach or foreshore he must obtain a lease of the land upon which the oysters are cultivated.¹⁰⁷ A further provision is made that no lease of land for the cultivation of oysters shall include a greater area than five acres, and the length of such leased area shall not exceed twice the breadth thereof.¹⁰⁸ Finally, the Lieutenant-Governor in Council is authorized to lease land on any of the coasts of Nova Scotia to persons who intend to establish fish traps or weirs thereon.

The Beaches Protection Act provides for the designation of lands lying under tidal water or adjacent to such land as protected beaches.¹⁰⁹ This Act is concerned with the physical protection of the sand, gravel and stones on the beach and has little to do with the use that may be made of the water lying around the beaches.

Regulations¹¹⁰ under the Public Health Act¹¹¹ regulate swimming and other water activities, and in particular provide that only bathing beaches or bathing areas free of dangerous pollution are to be used.

The Marshland Reclamation Act¹¹² provides that the Minister of Agriculture and Marketing may, with the approval of the Lieutenant-Governor in Council construct and operate any works for the protection, drainage and improvement of marshlands. "Marshland" is defined in section 1(d) to mean land forming part of the sea coast or the bank of a tidal river below the level of the highest tide.

The Water Act¹¹³ is largely aimed at water in watercourses and surface and ground waters. However, under section 12,¹¹⁴ the Minister appointed under the Act is given control and general supervision of shore water, of the allocation of water and of pollution originating within the jurisdiction of the province. Some, at least, of these provisions would extend to coastal waters within provincial jurisdiction, but the extent of the Minister's authority gives rise to problems of the type already discussed in dealing with similar provisions in New Brunswick and

106. R.S.N.S., 1967, c. 19, s. 1(1)(a), (b). For grants under this Act, see the following orders in council: 56-236 of Oct. 1, 1949; 58-167 of Oct. 4, 1950; 67-202 of Aug. 3, 1955; 71-247 of Sept. 15, 1958; 71-361 of Dec. 1, 1958; 72-97 of Feb. 25, 1959; 72-135 of March 18, 1959; 73-214 of Dec. 1, 1959; 74-171 of May 27, 1960; 74-314 of Aug. 31, 1960; 75-26 of Oct. 28, 1960; 75-220 of March 28, 1961; 75-288 of May 2, 1961; 75-328 of May 24, 1961; 77-8 and 9 of Jan. 30, 1962; 81-134 of July 17, 1965; 81-192 of March 2, 1965.

107. *Ibid.*, s. 4(1).

108. *Ibid.*, s. 4(2).

109. R.S.N.S., 1967, c. 20, s. 1(1). For such designations, see the following orders in council: 74-314 and 315 of Aug. 31, 1960; 79-26 of July 17, 1963; 79-229 of Dec. 31, 1963; 84-61 of Sept. 21, 1966; 85-298 of Aug. 29, 1967.

110. Made July 25, 1967, and tabled Dec. 1, 1967.

111. R.S.N.S., 1967, c. 247, s. 11(1).

112. R.S.N.S., 1967, c. 177.

113. R.S.N.S., 1967, as amended by (1968), 17 Eliz. II, c. 64, and (1970), 19 Eliz. II, c. 77 (N.S.).

114. See also *ibid.*, s. 16.

Prince Edward Island.¹¹⁵ The Environmental Pollution Control Act¹¹⁶ clearly appears to apply to coastal waters within the jurisdiction of the province. The Act has already been discussed in Chapter Five.

The Lands and Forests Act has also been previously discussed.¹¹⁷ The various grants and leases under this Act may relate to the coast and coastal waters.

There are several statutes regarding the control and ownership of wharves, docks and other structures connected with the shore. The Wharves and Public Landings Act gives the council of every municipality control of all public wharves and landings within the municipality that fall under the legislative jurisdiction of the province.¹¹⁸ By virtue of the Municipal Act all docks, quays, wharves, slips, breakwaters and other structures connected with the shore or any part of a municipality are deemed to be situated within, and form part of the municipality.¹¹⁹ That Act also gives municipal councils power to make by-laws respecting the use and management of docks, wharves, landings and cranes except where they are the property of Her Majesty.¹²⁰

The Mines Act allows individuals who require a lease of any land or any interest in any land for the purpose of constructing or adding to any wharf or work connected with, or incidental to, the operation of any mine, to apply to the Minister of Mines for proceedings to be taken under the Mines Act that would enable them to acquire the property.¹²¹ It also provides that any lessee of a submarine area, who for the purpose of the proper working of his mine requires access to the minerals by means of a tunnel or shaft through any adjoining area, whether submarine or land, and who is unable to acquire the right to construct what he needs from the holder of the lease of the adjoining area, may present a petition to the Minister setting out his claim and petitioning for the right to do what he proposes.¹²² Where a lease is acquired under one of the foregoing provisions, the lessee is required to mark the corners of the area with a post or monument.¹²³ Where a post would be at a corner that is covered with water and would cause inconvenience to the public, the post may, with the consent of the Minister, be placed on the land adjoining the corner.

Several statutes affect fishing in or around coastal waters. The provisions of the Beaches and Foreshores Act have already been mentioned. The Oyster Fisheries Act also contains provisions for the leases of plots of land under water for the cultivation of oysters.¹²⁴ It provides that the Lieutenant-Governor in Council may cause surveys to be made of the beds of bays and harbours to be divided into plots of such areas as it deems proper, and may lease such plots to applicants upon such terms as are deemed expedient.¹²⁵ A more extensive procedure

115. See pp. 436-7, 472, 474.

116. (1970), 19 Eliz. II, c. 4. (N.S.).

117. R.S.N.S., c. 163; see pp. 141-2.

118. R.S.N.S., 1967, c. 338, s. 1.

119. R.S.N.S., 1967, c. 192, s. 8(4).

120. *Ibid.*, s. 191(37).

121. R.S.N.S., 1967, c. 185, s. 111(1).

122. *Ibid.*, s. 119(1).

123. *Ibid.*, s. 133(1).

124. R.S.N.S., 1967, c. 220.

125. *Ibid.*, s. 2.

for application is to be followed when the person applying for the lease does not own the land in front of which the plot is located.¹²⁶ All rights conferred by these leases are subject to the Fishery Regulations of Canada, and the right or title of Canada to use and enjoy any public harbour for purposes other than cultivation and production of oysters is not affected.¹²⁷

The Sea Plants Harvesting Act requires that a licence must be obtained to harvest sea plants, and only one licence will be issued for a particular area.¹²⁸ The Minister of Fisheries may, however, with the approval of the Lieutenant-Governor in Council, designate areas in which all persons may harvest sea plants.¹²⁹ Where this is the case an individual licence will not be granted for this particular area. Regulations under the Act regulate the harvesting of sea plants.¹³⁰

There are a few other provisions that may affect coastal waters. Thus the Municipal Act¹³¹ empowers councils to vote money for the purpose of establishing and operating ferries. Again the Power Commission Act gives the Power Commission authority to do everything incidental to the generation and transmission of electric power.¹³² This naturally may include use of coastal waters. The Commission is granted the right to expropriate any land and water necessary for their purposes.¹³³

NEWFOUNDLAND STATUTES

Several Newfoundland statutes contain provisions relating to beaches. Section 88 of the Crown Lands (Mines and Quarries) Act restricts the removal of rock, sand, clay and the like from a beach without written permission.¹³⁴ "Beach" is defined as Crown lands extending from low water mark inland to the berm of the coastline.¹³⁵ The Department of Highways Act prohibits the encroachment or obstruction of highways, beaches, airstrips or ferry landings or the public way to any of them.¹³⁶

Section 13 of the Crown Lands Act authorizes the Lieutenant-Governor in Council to grant, lease or licence seashore, foreshore or public waters and land under them, or the right to use them.¹³⁷ Numerous water lots have been granted, primarily in coastal waters to various companies by agreements validated by the following statutes:

126. *Ibid.*, ss. 3, 6.

127. *Ibid.*, s. 15.

128. R.S.N.S., 1967, c. 279, s. 2(3).

129. *Ibid.*, s. 2(2).

130. Made Feb. 3, 1967, tabled Feb. 10, 1967, and approved by the Lieutenant-Governor in Council Feb. 14, 1967.

131. R.S.N.S., 1967, c. 192, s. 136(n).

132. R.S.N.S., 1967, c. 233, s. 22(1). [See also the recently enacted Tidal Power Corporation Act, discussed in the Addendum, at p. 504.].

133. *Ibid.*, s. 22(2)(c).

134. 1961, No. 1, s. 88 (Nfld.). [For recent amendments, see the Addendum, at pp. 506-7.].

135. *Ibid.*, s. 88(4).

136. 1966, No. 13, s. 31(1).

137. R.S.N., 1952, c. 174 (Nfld.) as amended. [For recent statutory agreements granting wharf properties, see Addendum, p. 508.].

- (1) Dry or Graving Dock Act;¹³⁸
- (2) Newfoundland Train and Ferry Syndicate Act;¹³⁹
- (3) Holyrood Pond Fisheries Agreement Act;¹⁴⁰
- (4) Mortier Bay Free Port Act;¹⁴¹
- (5) Lake Melville Development Co. Act;¹⁴²
- (6) Mortier Bay Development Act;¹⁴³
- (7) Electric Reduction Company of Canada (Agreement) Act.¹⁴⁴

The Management and Control of Harbours Act provides for the operation of harbours in Newfoundland except the Port of St. John's.¹⁴⁵ A federal statute makes provision for repealing this Act, but the provision has not yet been proclaimed.¹⁴⁶ Under the Act, a Board of Harbour Commissioners is authorized to make regulations to control and regulate the movement, anchorage and removal of ships and navigation within the ports. The Board is also concerned with the removal of obstructions to navigation as well as damage to wharves. The ports of St. John's¹⁴⁷ and Port aux Basques¹⁴⁸ had special statutes governing them until 1965, but they have now been repealed.¹⁴⁹ Finally the Grand Bank and Fortune Harbours Improvement Act provides for dredging and deepening these harbours.¹⁵⁰ In common with other pre-Confederation Acts dealing with navigation, this statute now comes within federal jurisdiction and could be repealed by federal legislation. The same may possibly be true of the Nuisances and Municipal Regulations Act which prohibits the throwing of rubbish into public coves, or stones and ballast into harbours, or obstructing public coves.¹⁵¹

Though the Water Resources and Pollution Control Act is generally concerned with watercourses and surface and ground waters, there is a general provision giving the Water Authority control of shore waters, the allocation of the use of water and pollution of water originating within the jurisdiction of the province¹⁵² that may well apply to coastal waters. There are serious difficulties in construing the extent of the authority given under this provision that have already been discussed in relation to similar provisions in other provinces.¹⁵³

138. (1883), 46 Vict., c. 5, s. 5 (Nfld.). This Act grants foreshore and riparian rights in connection with the harbour of St. John's.

139. (1914), 4 Geo. V, c. 6 (Nfld.). Section 3 grants to Bowaters foreshore or seashore and public waters and lands for wharves, docks and piers.

140. (1927), 18 Geo. V, c. 3. By section 6 the company was granted a portion of beach.

141. 1938, No. 32, s. 2 (Nfld.). This grants foreshore rights.

142. 1939, No. 29, s. 26 (Nfld.). This authorizes the government to grant sites on the foreshore.

143. 1958, No. 43, s. 3 (Nfld.), as amended, grants foreshore rights.

144. 1966-7, No. 49 (Nfld.). Clauses 3 and 4 and schedules C and D provide for 50 year leases to the company with a 50 year option in some cases and in others a grant in fee simple to lands at Long Harbour.

145. R.S.N., 1952, c. 216, s. 2.

146. (1964), 13 Eliz. II, c. 33, s. 2 (Can.).

147. R.S.N., 1952, c. 217, s. 11.

148. R.S.N., 1952, c. 218.

149. (1964), 13 Eliz. II, c. 33; SOR/65-21 (Can.).

150. (1879), 42 Vict., c. 9 (Nfld.).

151. R.S.N., 1952, c. 72, ss. 2(5), 3, 4.

152. 1966-7, No. 57 (Nfld.). [This Act has now been repealed and replaced by the Clean Air, Water and Soil Authority Act; see Addendum, pp. 505-6.].

153. See pp. 436-7, 472, 474, 477.

Finally, several statutes attempt to make it clear that lands forming the bed of the sea fall within the jurisdiction of the province and may be granted to individuals or companies. The Crown Lands Act, for example, provides that mining licences may be granted for locations covered by the sea or public tidal waters.¹⁵⁴ Again the British Newfoundland Exploration Limited (Petroleum and Natural Gas) Act declares that it applies to all lands forming the bed of the sea inside a line drawn from headland to headland, and including all bays, estuaries, harbours and coves.¹⁵⁵ An amendment to the Government-British Newfoundland Exploration Limited (Agreement) Act¹⁵⁶ expressly declares that the grant of land includes the areas forming part of the sea that fall within provincial jurisdiction.¹⁵⁷

154. R.S.N., 1952, c. 174, s. 67.

155. 1963, No. 47, s. 3 (Nfld.).

156. 1957, No. 28, (Nfld.).

157. 1962, No. 73, s. 2 (Nfld.).

ADDENDUM

Recent Statutes

by Gerard V. La Forest

CANADA

Environment Canada

Probably the most important recent action of the Parliament of Canada affecting water in the Atlantic Provinces is the creation of the Department of the Environment under the Minister of the Environment, who is also the Minister of Fisheries.¹

As the name of the Department implies, the purpose of the legislation is to combine most functions of the Government of Canada relating to the environment in the Minister, though the Minister of Transport retains his former powers in the field. His powers and duties include all federal matters not otherwise assigned to a federal department or agency relating to, *inter alia*, sea coast and inland fisheries, water, the protection and enhancement of the quality of the natural environment including water, technical surveys relating to the foregoing, and the enforcement of the rules and regulations of the International Joint Commission as they relate to pollution.² In performing these functions the Minister may initiate, recommend and undertake programmes, and coordinate programmes of the Government of Canada that are designed to promote the establishment or adoption of objectives and standards relating to environmental quality or the control of pollution; he may also promote and encourage the institution of practices and conduct leading to the protection and enhancement of environmental quality, and cooperate with provincial governments and agencies and any other persons or bodies having similar objects.³ The Minister is to report to Parliament each year on the operation of the Department.⁴

The Department is given the administration of numerous Acts including the Canada Water Act, the Coastal Fisheries Protection Act, the Fisheries Act, the Fisheries Development Act, the International River Improvements Act, the Migratory Birds Convention Act, the Northwest Atlantic Fisheries Convention Act, and the Whaling Convention Act.⁵ Consequential changes are made in these Acts and other legal documents to refer to the Minister of the Environment and his officials rather than to the Ministers and officials formerly having jurisdiction over the matters.⁶ Among the Departments affected are Fisheries, Energy Mines

1. Government Organization Act, 1970 (1970-71), 19 and 20 Eliz. II, c. 42, s. 3 (Can.).

2. *Ibid.*, s. 5; see also s. 9.

3. *Ibid.*, s. 6.

4. *Ibid.*, s. 7.

5. *Ibid.*, s. 30, Schedule A.

6. *Ibid.*, s. 33, Schedule B; see also ss. 8-11.

and Resources, Health and Welfare, and Indian Affairs and Northern Development; the Department of Fisheries and Forestry has ceased to exist.⁷

Canada Shipping Act Amendments

General

A second important recent statute is one enacting a new Part XIX of the Canada Shipping Act dealing with pollution from ships and repealing the former Part VIIA dealing with the matter.⁸ The Part applies, *inter alia*, to all Canadian waters adjacent to the Atlantic Provinces.⁹

Pollution From Ships

One series of sections deals with the discharge of pollutants from ships. The Governor in Council is empowered to make regulations prohibiting the discharge of pollutants specified in the regulations in Canadian waters to which the Part applies.¹⁰ Violation of such a regulation is punishable on summary conviction by a fine not exceeding \$100.¹¹ "Pollutant" is broadly defined to mean (a) any substance that, if added to water, degrades or alters or forms part of a process of degradation or alteration of its quality to an extent that it is detrimental to its use by man or any animal, fish or plant that is useful to man; (b) any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed by heat or other means from a natural state that it would, if added to water, degrade or alter or form part of a process just described; and (c) includes oil and any substance or class of substances prescribed by the regulations.¹² Oil includes oil in any form, including sludge, oil refuse, and oil mixed with wastes, but not dredged spoil.¹³

Where a ship has discharged a pollutant or is in danger of doing so or of causing it to be discharged contrary to the regulations, the master must forthwith report it in the manner and place prescribed in the regulations to a pollution prevention officer designated by the Minister or to another officer designated by the Governor General in Council; he must similarly report where he has discharged a pollutant in circumstances prescribed by the regulations.¹⁴ Failure to do so is punishable on summary conviction by a fine not exceeding \$100.¹⁵

Where the Minister of Transport has reasonable cause to believe that a ship that is in distress, stranded, wrecked, sunk or abandoned is discharging or is likely to discharge a pollutant in Canadian waters or fishing zones, he may, or he may authorize any person to destroy, if necessary, or remove, if possible, and sell or otherwise dispose of the ship, its cargo or other material on board, use the

7. *Ibid.*

8. (1970-71), 19 and 20 Eliz. II, c. 27, ss. 1, 2 (Can.). [This is now R.S.C., 1970, c. 27 (2nd Supp.). Under this revision, the new Part is renumbered as Part XX, comprising sections 727 to 761, which are, respectively, the provisions cited herein as sections 736 to 770].

9. See R.S.C., 1952, c. 27, s. 736(2), as enacted by *ibid.*, s. 2.

10. *Ibid.*, s. 737(1).

11. *Ibid.*, s. 761.

12. *Ibid.*, ss. 736(1)(j), 739(1)(a).

13. *Ibid.*, s. 736(1)(h).

14. *Ibid.*, ss. 737(2), 739(1)(b).

15. *Ibid.*, s. 762(1)(a).

proceeds to meet the expenses of destroying, removing and disposing of the ship and materials, and pay any surplus to the owner.¹⁶

These provisions are rounded out by other regulation-making powers of the Governor in Council. These may include power to make regulations respecting the fitting, maintenance, testing and use of electronic and other navigational equipment on ships carrying pollutants; prescribing the types and maximum quantities of pollutants that may be carried on designated classes of ships, the maximum quantities that may be carried in their cargo holds or tanks and the method of storage therein; respecting the supplies, equipment, fittings and installations for handling pollutants on ships and for dealing with discharges thereof; respecting the method of retention of oily or other wastes by ships carrying pollutants; respecting various matters concerning the navigation of ships to which the provisions apply, including compulsory traffic routes and other traffic controls, appropriate charts, lights, procedures, personnel and the use of pilots; prescribing the supplies and equipment to be used in loading and unloading such ships; respecting the keeping of records relating to activities on such ships that result or may result in the discharge of a pollutant or to loadings and unloadings of such ships.¹⁷ The regulations may also provide for the issue to owners and masters of ships of certificates of compliance of ships with the requirements of the regulations applicable thereto.¹⁸ A ship in respect of which such a certificate may be issued that enters waters to which this Part applies without having such a certificate on board is guilty of an offence and is liable on summary conviction to a fine not exceeding \$100,000.¹⁹

To enforce these provisions, the Minister may appoint pollution prevention officers who have such powers as may be designated on their certificates of designation.²⁰ These may include the power to require any ship within or about to enter any Canadian waters or fishing zones to provide him with information concerning the condition of the ship, its machinery, equipment, cargo, fuel and any other information he considers appropriate for the administration of these provisions; to go on board and inspect such ships to determine whether they comply with the regulations; to order ships to proceed out of water to which the Part applies by such route and in such manner as he directs, to remain outside such waters and to proceed to and moor, anchor or remain for such time at such place as he may select if he believes the ship does not comply with the regulations or he is satisfied that this is justified to prevent the discharge of a pollutant; to determine the route and speed through such waters of ships that he reasonably suspects are carrying pollutants; and finally where he is informed that a substantial quantity of a pollutant has been discharged or has entered in such waters or where he is satisfied on reasonable grounds that a grave and imminent danger of a substantial discharge of pollutants in such waters exists, to order all ships

16. *Ibid.*, s. 738; "Minister" is defined in s. 2 of the principal Act (now R.S.C., 1970, c. S-9) as the Minister of Transport.

17. *Ibid.*, s. 739(1).

18. *Ibid.*, s. 739(2).

19. *Ibid.*, s. 763(2).

20. *Ibid.*, s. 740.

within a specified area in such waters to report their positions and order any ship to assist in cleaning up the pollutant or in any action to control or contain it, but the Crown must pay compensation for this service.²¹

A ship that fails to comply with any reasonable requirement, or with an order or direction of a pollution prevention officer under the preceding powers, and any person or ship that violates any regulation thereunder is guilty of an offence and is liable on summary conviction to a fine not exceeding \$100,000.²² The master and every person on a ship boarded by a pollution prevention officer in exercise of the powers of boarding just described must give him all reasonable assistance in carrying out his duties and furnish him with such information as he may reasonably require.²³ A person who obstructs or hinders, or knowingly makes a false or misleading statement to him is guilty of an offence punishable on summary conviction.²⁴

Civil Liability For Discharge

Another series of sections imposes civil liability in respect of damages from ships carrying pollutants in bulk, i.e. in a quantity exceeding that prescribed by regulation.²⁵ The owner of such a ship is liable for all actual loss or damage incurred by Her Majesty in right of Canada or a province or any other person from the discharge of a pollutant into waters to which the Part applies that is caused by or attributable to the ship.²⁶ He is also liable for costs and expenses (including court costs) of and incidental to the taking of any action authorized by the Governor in Council to repair or remedy any condition resulting from the discharge of a pollutant in such waters that is caused by or is attributable to that ship, or to reduce or mitigate any damage or destruction of life or property that results from or may reasonably be expected to result from such discharge, to the extent that such costs and expenses have been reasonably incurred in the circumstances.²⁷ The Governor in Council may, however, prescribe certain classes of ships that carry pollutants in bulk where the owner of the ship and the owner of the pollutant are jointly and severally liable in respect of the above matters.²⁸

The owner of a ship, in respect of which the Minister of Transport has, pursuant to the powers previously described, taken or authorized the taking of any action to remove a ship or remove or destroy its cargo or other material on board, is liable for the costs and expenses of and incidental to the taking of such action to the extent that these have been reasonably incurred.²⁹ Where the ship carries a pollutant and is of a class prescribed by the Governor in Council as above described, the owner of the ship and the owner of the pollutant are jointly and severally liable.³⁰ Suit for recovery of these costs and expenses may be brought in the Admiralty Court by the person authorized to destroy or remove the ship,

21. *Ibid.*, s. 741.

22. *Ibid.*, ss. 763(1), 764.

23. *Ibid.*, s. 742(1).

24. *Ibid.*, ss. 742(2), (3), 762(2).

25. *Ibid.*, ss. 736(1), (2), 739(1)(p).

26. *Ibid.*, s. 743(1).

27. *Ibid.*

28. *Ibid.*

29. *Ibid.*, s. 743(2).

30. *Ibid.*

cargo or materials or, if this is done by the Minister, by Her Majesty in right of Canada.³¹ It must be brought within two years of the time when the destruction or removal of the ship, cargo or material was authorized, or from the time the discharge of a pollutant first occurred or could reasonably have become known to those affected.³² The exemption from civil liability given by section 461(6) of the Act for throwing dangerous goods overboard does not relieve a person from liability under this Part unless this is done with the consent of the Minister and in accordance with the terms and conditions of such consent.³³

A number of sections define and limit the liability above described. First, such liability does not depend on proof of fault or negligence.³⁴ However, some qualifications must be made to this statement. First, a person is not liable to another person if he establishes that that other person (including someone for whom he is responsible) caused the discharge of the pollutant, or if the other person contributed to it, to the degree to which he contributed.³⁵ Secondly, where an incident occurs without the actual fault or privity of the owner of a ship or pollutant, his liability is limited in respect of that incident to the lesser of 2,000 gold francs for each ton of the ship's tonnage or 210,000,000 gold francs.³⁶

A further limitation is that a person is not liable if the discharge of the pollutant was wholly caused by an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable or irresistible character, by an act or an omission done with intent to cause damage by a third person, or by the negligence or wrongful act or omission of any person or government in the installation or maintenance of lights or other navigational aids.³⁷ Again, the Minister may exempt the owner of a pollutant from civil liability under this Part if he establishes to the Minister's satisfaction that the pollutant is of such a nature and quantity that if discharged it would not violate a regulation described above concerning such discharge.³⁸ Finally, nothing in the Part affects the right of a person who is liable thereunder to have recourse against any other person.³⁹

Provision is also made requiring that evidence of financial responsibility in the form of insurance or an indemnity or any other evidence of financial responsibility satisfactory to the Minister be provided by the owner of a ship that carries pollutants in bulk in an amount not less than the aggregate amount recoverable directly from him,⁴⁰ but these provisions only come into effect on proclamation.⁴¹ Such evidence shall be provided when entering waters to which the Part applies, or when leaving a facility in Canada where the pollutant is loaded.⁴² It must be in a form permitting a person entitled to recover directly from the proceeds of the insurance or bond.⁴³ A person who fails to supply such

31. *Ibid.*, s. 743(2), (3).

32. *Ibid.*, s. 743(4).

33. *Ibid.*, s. 743(5); s. 461(6) is now R.S.C., 1970, c. S-9, s. 450(5).

34. *Ibid.*, s. 744(1).

35. *Ibid.*, s. 744(1)(a), (2).

36. *Ibid.*, s. 744(4). For rules respecting the value of the gold franc and the computation of tonnage, see *ibid.* s. 744(5).

37. *Ibid.*, s. 744(1)(b).

38. *Ibid.*, s. 744(3).

39. *Ibid.*, s. 744(1).

40. *Ibid.*, s. 745(1).

41. (1966-67), 19 and 20 Eliz. II, c. 27, s. 4.

42. R.S.C., 1952, c. 27, s. 746, as enacted by *ibid.*

43. *Ibid.*, s. 745(2).

evidence is liable on summary conviction to a fine not exceeding \$100.⁴⁴ In the case of a ship of a class prescribed by the Governor General in Council, both the shipowner and the owner of the pollutant must supply evidence of financial responsibility.⁴⁵

Maritime Pollution Claims Fund

A Maritime Pollution Claims Fund is created for the purpose of paying claims for civil liability under the Part where recovery against the owner of the ship or pollutant from which the damage resulted has proved impossible, or the ship concerned cannot be identified, or a fisherman suffers loss of income from pollution. The fund is an account in the Consolidated Revenue Fund, made up of the various amounts hereafter described, together with interest on these amounts fixed by the Governor General in Council.⁴⁶ The Fund is administered by an Administrator, whose term and conditions of office and functions are described in the Act.⁴⁷ Among his duties is an obligation to report to the Minister of Transport at the end of each fiscal year; the latter must then lay the report before Parliament within fifteen days, or if Parliament is not then sitting during the first fifteen days of the next sitting.⁴⁸

The first type of payment that may be made out of the Fund relates to claims for civil liability under the Part where full satisfaction cannot be obtained against the owner of the ship or pollutant concerned. The Act provides that where proceedings are commenced in respect of a claim to recover costs, expenses, loss or damage against the owner of a ship or of a pollutant under the Part, the document commencing the proceeding must be served on the Administrator, who thereupon has all the rights and obligations of a party.⁴⁹ When such a claim is settled by or with the consent of the Administrator or proceedings respecting it result in a judgment in favour of the claimant, the Administrator must direct payment of the amount remaining unpaid if the following matters so far as applicable are established: (a) the amount remaining unpaid; (b) that all appeals have been disposed of or the time for appealing has elapsed; (c) that all reasonable steps have been taken to recover from the owner of the ship or pollutant; and (d) that the claimant has assigned his judgment or claim to the Administrator.⁵⁰

The second type of payment involves the case where Her Majesty in right of Canada or a province or any other person has a claim under this Part against the owner of a ship or of a pollutant but is unable to identify the ship responsible. In that case Her Majesty or such person may institute proceedings in the Admiralty Court against the Fund and thereupon the Fund is liable in the same way as if it were the owner of the ship carrying the pollutant.⁵¹ A judgment is

44. *Ibid.*, s. 762(1)(b).

45. *Ibid.*

46. *Ibid.*, s. 746.

47. *Ibid.*, s. 747; see also ss. 748-751.

48. *Ibid.*, s. 756.

49. *Ibid.*, s. 752.

50. *Ibid.*, s. 753.

51. *Ibid.*, s. 754(1).

not to be given to recover against the Fund, however, unless the court is satisfied that all reasonable efforts were made by the claimant to identify the ship responsible for the claim and that it cannot be identified.⁵²

The third type of payment is in respect of losses of income by a fisherman, a term that is defined as meaning any of the following: (a) the holder of a commercial fishing licence; (b) a hired hand who derives all or a substantial part of his income from employment as such on a fishing vessel; (c) a fishing vessel owner who derives all or a substantial part of his income from the rental of fishing vessels to holders of commercial fishing licences; and (d) a person who derives all or a substantial part of his income from the handling of fish on shore, but this does include the processing of fish.⁵³ Where a fisherman as thus defined alleges that he has suffered a loss of income, including future income, from his activities as a fisherman resulting from the discharge of a pollutant caused by or otherwise attributable to a ship and that is not otherwise recoverable, he may at any time within two years from the time the discharge first occurred or could reasonably have become known to him, notify the Administrator in the form prescribed by the Governor in Council.⁵⁴ On receiving the notice, the Administrator must, if he considers it appropriate for the proper administration of the Fund, direct payment of the loss as alleged in the notice or as agreed between the Administrator and the fisherman; otherwise he must transmit the notice to the Minister.⁵⁵ Upon receiving the notice the Minister, after consulting the Minister of Fisheries and the Administrator, is required to appoint one or more assessors, who are not public servants, and fix their remuneration and expenses.⁵⁶ In assessing the loss of income of a fisherman an assessor must, after giving the Administrator and the fisherman notice, meet with them or their representatives, and may receive and consider evidence submitted by them whether or not such evidence would be admissible before a court, and for these purposes an assessor has all the powers of a commissioner under Part I of the Inquiries Act.⁵⁷ Within sixty days of his appointment or such longer period as is agreed to by the Minister, the assessor must report whether or not, in his opinion, the alleged loss of income has been established, resulted from the discharge of a pollutant that was caused by or attributable to a ship, and is not otherwise recoverable.⁵⁸ Where he reports that such a loss has occurred from such a discharge and is not otherwise recoverable, the report shall set forth the amount of loss as assessed by the assessor.⁵⁹ On receiving the report, the Minister must forthwith send a copy to the fisherman and the Administrator, whereupon the latter must direct payment of the loss as assessed.⁶⁰

Payments directed to be made by the Administrator are charged to the Fund and are payable in accordance with the following priorities: (a) the remuneration

52. *Ibid.*, s. 754(2).

53. *Ibid.*, s. 736(1)(e).

54. *Ibid.*, s. 755(1).

55. *Ibid.*, s. 755(2).

56. *Ibid.*, s. 755(3).

57. *Ibid.*, s. 755(4).

58. *Ibid.*, s. 755(5).

59. *Ibid.*

60. *Ibid.*, s. 755(6).

and expenses of assessors and costs, expenses and fees of the Administrator take priority over all other payments; (b) in respect of claims and costs against the Fund, priority is to be given in accordance with the time the limitation period commenced; (c) claims by fishermen take priority in respect of other claims; and (d) claims for actual loss or damage take precedence over claims for costs and expenses incurred by the Governor General in Council in remedying a situation.⁶¹ Interest at a rate fixed by the Governor in Council must be paid on the unpaid amount of a payment when the delay exceeds one month.⁶²

The Fund is made up of payments to the Receiver General of such amounts, not exceeding fifteen per cent, as the Governor in Council prescribes in respect of each ton of oil imported by ship into Canada in bulk as cargo and in respect of each ton of oil shipped from any place in Canada in bulk as a cargo of a ship.⁶³ These payments or security therefor in an amount and form satisfactory to the Minister must be made, in the case of imported oil, before the oil is unloaded, and in the case of oil shipped from a place in Canada, before the ship leaves the place at which the oil is placed on board.⁶⁴ These amounts and any interest thereon are debts recoverable by the Crown in any court of competent jurisdiction from the owner, the shipper and the consignee in the case of imported oil, and from the owner, shipper or consignor in the case of oil shipped from a place in Canada.⁶⁵ Any person who wilfully evades or attempts to evade such payments is liable on summary conviction to a fine not exceeding \$5000.⁶⁶

Regulations of the Governor in Council may prescribe the amounts of payments and the manner in which they shall be paid, and provide for the filing with the Minister of information returns by owners, shippers, consignors and consignees of oil.⁶⁷ Regulations may also provide for payments in respect of any pollutant other than oil imported or shipped from a place in Canada in bulk as cargo of a ship, and may prescribe the amount of such payments, the time when they are to be made, the security that may be given in respect thereof, the persons from whom they are recoverable, and the information returns to be filed by such persons.⁶⁸ Interest not exceeding twelve per cent as the Governor in Council prescribes is payable on any outstanding amount owing in respect of such payments.⁶⁹ A person who fails to file an information return as required by these regulations is liable on summary conviction to a fine not exceeding \$100 for each day of default.⁷⁰

Offences and Seizures

Several provisions deal with procedures relating to offences. Jurisdiction is given to the courts having ordinary jurisdiction in the area where an offence is committed.⁷¹ And service may be effected on a ship by leaving the summons with

61. *Ibid.*, s. 760(1).

62. *Ibid.*, s. 760(2).

63. *Ibid.*, s. 757(1).

64. *Ibid.*, s. 757(2).

65. *Ibid.*, s. 757(3).

66. *Ibid.*, s. 765(1).

67. *Ibid.*, s. 758(a), (b).

68. *Ibid.*, s. 758(b), (c).

69. *Ibid.*, s. 759.

70. *Ibid.*, s. 765(2).

71. *Ibid.*, s. 768(1).

the master or any officer, or by posting it on a conspicuous part of the ship.⁷² The ship may appear by counsel or agent, and proceedings against it may be held *ex parte* on proof of service.⁷³ In a prosecution for an offence by a ship, it is sufficient proof that the ship has committed the offence to establish that the act or neglect constituting the offence was committed by the master or any person on board, other than a pollution prevention officer, whether the person is identified or not, and for the purposes of any prosecution of a ship for failing to comply with any requirement, order or direction of a pollution prevention officer, any requirement, order or direction given to the master or any person on board shall be deemed to have been given to the ship.⁷⁴

Again, there are provisions for proof of offences by certificates of analysts designated by the Minister.⁷⁵ A certificate of such an analyst stating that he has analysed or examined a sample submitted to him by a pollution prevention officer and stating the result of his analysis or examination is admissible in evidence in any prosecution for a violation of a regulation prohibiting the discharge of a pollutant from ships, and in the absence of any evidence to the contrary, is proof of the statements therein without proof of the signature or official character of the analyst.⁷⁶ However, if such a certificate is to be produced reasonable notice must be given to the person against whom it is produced, and such person may, with leave of the court, require the attendance of the analyst for cross-examination.⁷⁷

Finally, a number of sections give power to seize ships. When a pollution prevention officer suspects on reasonable grounds that a ship has violated a provision of the Part or the regulations thereunder, or that the owner of a ship or of a pollutant carried thereon fails to provide evidence of financial responsibility as required under the Part, he may, with the consent of the Minister, seize the ship and any pollutant thereon anywhere in waters to which the Part or the Arctic Waters Pollution Prevention Act applies.⁷⁸ A ship or pollutant so seized is to be kept in the custody of the pollution prevention officer or delivered in the custody of such persons as the Minister directs.⁷⁹ Where all or part of a pollutant seized is perishable, the pollution prevention officer may sell the perishable portion and the proceeds are to be paid to or deposited in a chartered bank to the credit of the Receiver General.⁸⁰ Any ship or pollutant and the proceeds of a sale of a perishable pollutant must, within 30 days of the seizure, be returned to the person from whom it was seized unless proceedings have been instituted in respect of the alleged offence.⁸¹ Moreover, a court before which such proceedings are instituted may, with the consent of the Minister, order redelivery of the ship or pollutant if security for the payment of the maximum fine imposable is given to Her Majesty in right of Canada.⁸² Where the proceed-

72. *Ibid.*, s. 768(2).

73. *Ibid.*

74. *Ibid.*, s. 766.

75. *Ibid.*, s. 736(b).

76. *Ibid.*, s. 767(1).

77. *Ibid.*, s. 767(2), (3).

78. *Ibid.*, s. 769(1).

79. *Ibid.*, s. 769(2).

80. *Ibid.*, s. 769(3).

81. *Ibid.*, s. 770(1).

82. *Ibid.*, s. 770(2).

ings are dismissed, the ship and pollutant or the proceeds of sale thereof or any security given, shall, if no appeal is taken within the time fixed by law, or if the dismissal is confirmed on any appeal therefrom, be redelivered or paid to the person from whom they were seized to the person who gave the security.⁸³ Finally, if the proceedings result in a conviction and fine, and the fine is not paid as required by the convicting court or by a court on appeal, the fine may be recovered, with costs, out of the proceeds of the sale of the ship and the pollutant or any security given; and any seized property not so sold and any surplus funds from any sale shall be redelivered to the person from whom the property was seized.⁸⁴

Arctic Waters Pollution Prevention Act

The application of the Arctic Waters Pollution Prevention Act to the Atlantic Provinces is limited to the waters adjacent to the most northerly tip of Labrador lying to the north of the sixtieth parallel of north latitude.⁸⁵ For that reason, it need not be extensively discussed.

The Act prohibits the deposit of waste (a term that is very broadly defined)⁸⁶ in arctic waters or on the mainland or any island in the Canadian arctic where it may enter such waters, though exceptions may be made under regulations.⁸⁷ A person or ship that violates the prohibition or is in danger of causing the unauthorized deposit of waste is required to report to a pollution prevention officer.⁸⁸ These officers have broad powers of entering and inspecting premises, works and ships, and of seizing ships; ships so seized are subject to forfeiture on conviction for an offence.⁸⁹

Civil liability is imposed on the following persons for damages incurred by other persons from the deposit of waste in violation of the above prohibition: any person engaged in exploring for, developing or exploiting any natural resources on land adjacent to arctic waters or any submarine area subjacent to them, one who carries on any undertaking in arctic waters or the Canadian arctic, the owner of ships navigating these waters, and the owner of their cargoes.⁹⁰ Such persons are also civilly liable for costs and expenses undertaken by Her Majesty to repair or remedy a condition resulting from the deposit of waste in violation of the Act.⁹¹

The Act empowers the Governor in Council to establish shipping control zones, regulate navigation and prescribe standards for ships navigating therein.⁹² It further requires evidence of financial responsibility from persons engaged in the exploration, development or exploitation of natural resources, persons engaged in the construction, alteration or operation of undertakings resulting

83. *Ibid.*, s. 770(3).

84. *Ibid.*, s. 770(4).

85. R.S.C., 1970, c. 2 (1st supp.), s. 3.

86. *Ibid.*, s. 2.

87. *Ibid.*, ss. 4, 18.

88. *Ibid.*, s. 5; see also ss. 19(1), 23-6.

89. See *ibid.*, ss. 14-7.

90. *Ibid.*, s. 6(1).

91. *Ibid.*, s. 6(1), (2).

92. *Ibid.*, ss. 11, 12.

or likely to result in the deposit of waste that enters or may enter into arctic waters, and the owners of ships or cargoes of ships navigating or proposing to navigate in shipping control zones.⁹³

The Act comes into force on proclamation.⁹⁴

NEW BRUNSWICK

Clean Environment Act

The most important general statute relating to water enacted in New Brunswick in recent years is the Clean Environment Act of 1971.⁹⁵ It provides for the creation of an environmental council and for other administrative provisions, and establishes a number of important rules relating to the use of water.

The environmental council is to consist of five members, one of whom may be designated chairman and one, vice-chairman, appointed by the Lieutenant-Governor in Council, but they are not to be members of the legislature or employed by the province or the Government of Canada.⁹⁶ Members hold office for three years or until a successor is appointed and are paid their necessary expenses and may be paid a *per diem* allowance.⁹⁷ The council may establish its own procedure, though it is expressly provided that three members, including the chairman or vice-chairman, constitute a quorum.⁹⁸

The council is charged with studying, investigating and reporting to the Minister of Fisheries and Environment on matters coming within the Act with the approval of the Minister, or when so requested by him or the Lieutenant-Governor in Council; it must also receive submissions from any person concerning such matters.⁹⁹ The council must also make an annual report to the Minister on matters with which it has dealt, which report must be laid before the next session of the legislature.¹⁰⁰ Finally, the council may, with the approval of the Minister, engage persons in connection with any public hearing, investigation or study under the Act.¹⁰¹

The Minister may appoint inspectors and analysts for the purposes of the Act.¹⁰² An inspector may, at any reasonable time upon presentation of a certificate or other means of identification provided by regulations, do any of the following things for the purpose of enforcing the Act: enter and search any area or premises, other than a private dwelling, in which he reasonably believes a contaminant or waste is being produced, discharged or emitted; inspect any installation, plant or machinery, and inspect and test any process of production or manufacture and any raw or manufactured substance used therein or relating thereto that he reasonably believes may be producing, discharging or emitting

93. *Ibid.*, s. 8.

94. *Ibid.*, s. 28.

95. (1971), 20 Eliz. II, c. 3 (N.B.).

96. *Ibid.*, s. 15(1), (2).

97. *Ibid.*, ss. 15(4), (5).

98. *Ibid.*, ss. 15(3), 17.

99. *Ibid.*, ss. 16, 18, 2(h).

100. *Ibid.*, ss. 19, 20.

101. *Ibid.*, s. 21.

102. *Ibid.*, ss. 22, 27.

contaminants or waste, and take samples of discharges, deposits, effluents or emissions; detain for purposes of evidence any raw or manufactured substance and retain samples thereof; enter any area or premises, other than a private dwelling, in which he reasonably believes water has been, is or will be used or diverted in contravention of the Act; and inspect any installation, plant or machinery and inspect and test any process of production or manufacture to determine whether water has been, is or will be used in contravention of the Act.¹⁰³ No one is to obstruct or hinder an inspector or knowingly make a false or misleading statement to him or any other person carrying out his duties under the Act, and the owner or person in charge of an area or premises or any person found therein must furnish all reasonable assistance and information.¹⁰⁴ Further matters relating to the duties and powers of inspectors may be provided by regulation.¹⁰⁵

The foregoing cannot be fully understood without reference to definitions in the Act. "Contaminant" is defined as any substance prescribed by regulation that is foreign to or in excess of the natural constituents of the environment (an expression that includes water),¹⁰⁶ that affects the natural, physical, chemical or biological quality of the environment; that endangers the health, safety or comfort of a person or animal life; that causes damage to property or plant life; or that interferes with visibility or the normal conduct of transport or business or the normal enjoyment of life or property.¹⁰⁷ "Waste" includes rubbish, slimes, tailings, effluent sewage and waste products of any kind as well as smoke of mining, factory, business undertakings and industrial works that is prescribed by regulation to be waste.¹⁰⁸ And "water" includes flowing or standing water whether on or below ground.¹⁰⁹

Even more important than the administrative machinery are the principles set forth regarding the uses of water. Thus the control of all water in the province is declared to be, and to have always been vested in the Crown in right of the province, and this is strengthened by the provision that no right to use or divert water can be acquired by prescription.¹¹⁰ This would appear to divest landowners of riparian rights relating to the flow or diversion of water. It is, in any event, expressly provided that, except as provided by the Act or regulations thereunder, the use or diversion of water shall be regulated by licences issued by the Minister with the approval of the Lieutenant-Governor in Council, and licensees must pay such fees, rentals and charges as may be established by regulation.¹¹¹ However, a person who has lawful access to water has the right to the temporary use of it for domestic or agricultural purposes,¹¹² and it seems probable that riparian rights would apply in a case involving unlicensed parties. Riparian rights other than those involving the use of water, for example, the right of

103. *Ibid.*, s. 23.

104. *Ibid.*, ss. 24, 25, 26.

105. *Ibid.*, s. 31(h).

106. *Ibid.*, s. 2(f).

107. *Ibid.*, s. 2(e).

108. *Ibid.*, s. 2(l).

109. *Ibid.*, s. 2(m).

110. *Ibid.*, s. 7.

111. *Ibid.*, ss. 8, 29.

112. *Ibid.*, s. 9.

access and the right of accretion, are not directly affected by the Act, but it is not clear to what extent they may be indirectly affected.

Further control over water is effected by the provision prohibiting a person who is not the holder of an annual permit from engaging in the business of well drilling or undertaking the zoning, drilling or digging of a well on lands of which he is not the owner or lessee, or undertaking any operation incidental to the reconditioning or abandonment of a well on such lands.¹¹³

Licences or permits under the Act are issued by the Minister of Fisheries and Environment, who may also suspend, cancel, renew and reinstate them in the manner prescribed by regulations.¹¹⁴ A register of these must be kept containing such information as may be prescribed by regulations which is to be kept open for inspection at all reasonable times by any person on paying the prescribed fee.¹¹⁵ A person whose licence or permit is cancelled or who is refused a renewal thereof may appeal in the manner, and on payment of the fees and charges prescribed by regulations.¹¹⁶

The Lieutenant-Governor in Council is empowered to prohibit, restrict or limit the leaving, depositing or throwing or causing the leaving, depositing or throwing into any body of water or ice thereon, or causing, suffering or permitting the discharge or emission thereon of any contaminant or waste.¹¹⁷ "Body of water" is defined as including any flowing or standing water whether naturally or artificially created.¹¹⁸ Similar provisions exist to prohibit or limit similar deposits in air or soil, which of course may also have the effect of protecting water from pollution.¹¹⁹ However, the Lieutenant-Governor in Council may, for such times and subject to such terms as he may prescribe, exempt from these prohibitions any person who by virtue of any Act or agreement made before the commencement of the Clean Environment Act is authorized or permitted to discharge or emit contaminants or waste.¹²⁰

Provisions exist for coordinating the efforts of various bodies involved in environmental control. With the approval of the Lieutenant-Governor in Council the Minister may enter into arrangements with Canada, other provinces, municipalities or any person to carry out the intent of the Act and by such arrangement establish intergovernmental or other committees to coordinate and implement programmes relating thereto and maintain consultations and advise on relevant policies and programmes.¹²¹

A penalty enforceable on summary conviction is provided for a violation of the Act; in the case of an individual, it is a fine not exceeding \$500 and in default of payment to imprisonment for a period not exceeding six months; in the case of a corporation, it is a fine not exceeding \$5,000.¹²² A person is guilty of a separate offence for each day a violation continues.¹²³ Proof that the offence

113. *Ibid.*, s. 10.

114. *Ibid.*, ss. 11, 31(d).

115. *Ibid.*, ss. 12, 31(e).

116. *Ibid.*, ss. 13, 29, 31(f), (g).

117. *Ibid.*, s. 5.

118. *Ibid.*, s. 2(c).

119. *Ibid.*, ss. 3, 4.

120. *Ibid.*, s. 6.

121. *Ibid.*, s. 14.

122. *Ibid.*, s. 32.

123. *Ibid.*, s. 33.

has been committed by an employee or agent is sufficient, whether or not the latter is identified or has been prosecuted for the offence unless the accused establishes that it was committed without his consent and that he exercised due diligence to prevent its commission.¹²⁴ Proceedings may be commenced at any time within two years, and the fact that an offence has been committed under the Act does not suspend or affect any civil remedy respecting the act committed.¹²⁵

Special provisions exist for the use in proceedings under the Act of studies conducted by an analyst appointed under the Act. A certificate by such an analyst setting forth his analysis or examination of a sample submitted to him by an inspector is admissible in evidence in any prosecution under the Act and, in the absence of contrary evidence, is proof of the statements contained therein without proof of signature or official character of the person signing it.¹²⁶ However, reasonable notice must be given to the person against whom such certificate is to be produced, and such person may, with the leave of the court, require the attendance of the analyst for cross-examination.¹²⁷

Finally, it should be noted that the Act applies to the Crown in right of the province.¹²⁸

Water Act Amendments

The Clean Environment Act takes priority over the Water Act.¹²⁹ The latter Act, as amended in 1971, provides that in case of conflict between it and regulations thereunder and any other Act, except the Clean Environment Act or regulations thereunder, the Water Act prevails.¹³⁰

Further amendments to the Water Act, largely administrative and technical, were made at the same time. The administration of the Act is transferred from the Minister of Natural Resources to the Minister of Fisheries and Environment, who may designate others to perform his functions.¹³¹ Membership in the Water Authority is reduced from eight to seven members consisting of representatives of the Departments of Agriculture and Rural Development, Economic Growth, Health, Municipal Affairs, Natural Resources, and Tourism, and the New Brunswick Electric Power Commission.¹³² The Advisory Board is abolished.¹³³ And the jurisdiction formerly vested in the Minister of Health and Welfare is vested in the Minister of Health.¹³⁴ Finally the penalty section is amended so that a violation by an individual is subject to a maximum fine of \$500 or six months imprisonment on default, and by a corporation to a maximum fine of \$1,500, and an offender is guilty of a separate offence for each day a violation is committed.¹³⁵

124. *Ibid.*, s. 34.

125. *Ibid.*, ss. 35, 36.

126. *Ibid.*, s. 28(1).

127. *Ibid.*, s. 28(2), (3).

128. *Ibid.*, s. 30.

129. (1960-61), 9 & 10 Eliz. II, c. 19 (N.B.).

130. *Ibid.*, s. 6, as enacted by (1971), 20 Eliz. II, c. 76, s. 4 (N.B.).

131. *Ibid.*, s. 1(c), as enacted by (1971), 20 Eliz. II, c. 76, s. 1(b) (N.B.).

132. *Ibid.*, s. 2(2)(b), as enacted by (1971), 20 Eliz. II, c. 76, s. 2 (N.B.).

133. (1971), 20 Eliz. II, c. 76, ss. 1(a), 3.

134. *Ibid.*, s. 5.

135. *Ibid.*, s. 6, re-enacting (1960-61), 9 & 10 Eliz. II, c. 19, s. 15 (N.B.).

Other General Statutes

There have been several amendments to the municipal Acts. The most important for our purposes is an amendment to the Municipalities Act that gives, to corporations created under section 7B of the Water Act to maintain and operate water works and sewage works, some of the same powers to collect fees for services as municipalities.¹³⁶

Several new sections have been added to the Drainage of Farm Lands Act.¹³⁷ One provides that where adjacent landowners have jointly paid for the construction of ditches or drains to serve their properties, none of them may place an impediment in the ditch or drain that interferes with the passage of water without the consent of the others.¹³⁸ All such owners are jointly responsible for maintaining and repairing such ditches or drains.¹³⁹ If this cannot be financed by mutual agreement any owner may apply to the Minister of Agriculture and Rural Development for permission to carry on the work, and the Minister or anyone designated by him may investigate the need for the repairs, estimate the cost, determine the damage done to any property, seek agreement between the parties, carry out the repairs whether or not agreement is reached, and assess each owner of land benefitted.¹⁴⁰ Costs incurred by the Minister or his designee in doing such repair constitute a debt to Her Majesty from the person assessed by the Minister and may be recovered by action with costs.¹⁴¹

A few other general statutes may be mentioned. The Tourism Development Act,¹⁴² which repeals a number of relevant provisions of the Hotels Act and the Innkeepers Act and the whole of the Public Accommodations Act,¹⁴³ provides *inter alia*, that the Minister of Tourism may acquire and hold lands including lands covered with water, and regulate bathing and toilet facilities at tourist establishments.¹⁴⁴ Amendments to the Industrial Safety Act deal with safeguards against hazards involved in water diving operations, among other activities.¹⁴⁵

Private Acts

Finally, a number of private Acts give the following firms important rights respecting certain waters:

Fundy Forest Industries Ltd.¹⁴⁶

Miramichi Timber Resources Ltd.¹⁴⁷

New Brunswick Railway Co.¹⁴⁸

136. (1966), 15 Eliz. II, c. 20, s. 188(18), as enacted by (1970), 19 Eliz. II, c. 37, s. 9 (N.B.); the powers given are those under ss. 188(10), (11), (12), (14), (15).

137. R.S.N.B., 1952, c. 65, ss. 6-9, as enacted by (1971), 20 Eliz. II, c. 28, s. 1 (N.B.).

138. *Ibid.*, s. 6.

139. *Ibid.*, s. 7.

140. *Ibid.*, s. 8.

141. *Ibid.*, s. 9.

142. (1971), 20 Eliz. II, c. 14 (N.B.).

143. *Ibid.*, s. 15.

144. *Ibid.*, ss. 3(e), 4(a).

145. (1971), 20 Eliz. II, c. 14, re-enacting (1964), 13 Eliz. II, c. 5, s. 14(e) (iii) (N.B.).

146. (1971), 20 Eliz. II, c. 80 (N.B.).

147. (1970), 19 Eliz. II, c. 60; (1971), 20 Eliz. II, c. 84 (N.B.).

148. (1971), 20 Eliz. II, c. 87 (N.B.).

PRINCE EDWARD ISLAND

Environmental Control Commission Act

The most important recent statute of Prince Edward Island dealing with water is the Environmental Control Commission Act,¹⁴⁹ which repeals the Water Authority Act,¹⁵⁰ and centralizes the government's activities relating to the environment. The Act creates the Environmental Control Commission, which succeeds to all the powers of the Water Authority, including its property and contractual rights.¹⁵¹ The Commission is made a body politic and an agent of the Crown and its members have all the powers of a Commissioner under the Public Inquiries Act.¹⁵² It is responsible to the Minister of Community Services,¹⁵³ and must annually report to the Lieutenant-Governor respecting its property, operation, revenues and expenses, which report must be laid before the legislature.¹⁵⁴

The Commission consists of at least eleven members: a chairman, representatives of the Departments of Health, Community Services, Labour, Industry and Commerce (Industry and Commerce Branch), Development, Highways, Agriculture, and Fisheries, and such other persons as the Lieutenant-Governor in Council may appoint.¹⁵⁵ Members hold office during pleasure.¹⁵⁶ Their salaries are fixed by the Lieutenant-Governor in Council who may designate one of them to be vice-chairman.¹⁵⁷ Six members constitute a quorum.¹⁵⁸ Where a member is incapacitated the Lieutenant-Governor in Council may replace him permanently or temporarily.¹⁵⁹ The secretary and other officers of the Commission are public servants and the Lieutenant-Governor in Council may assign to it such experts as it may require and fix their remuneration.¹⁶⁰ The Lieutenant-Governor in Council may require departments and other provincial agencies to provide the Commission with administrative and professional assistance.¹⁶¹

Certain protections are accorded the Commission and its members. No writ of Quo Warranto, Mandamus, Certiorari or prohibition, or any injunction may be issued against the Commission or its members in their official capacity,¹⁶² nor may the members of the Commission or the Advisory Council or employees of the former be prosecuted by reason of official acts done in good faith.¹⁶³

The Lieutenant-Governor in Council may appoint an Environmental Advisory Council to the Commission with such duties as may be prescribed by regulations.¹⁶⁴ It is to consist of ten to fifteen members, including representatives of the Depart-

149. (1971), Bill No. 23 (P.E.I.).

150. *Ibid.*, s. 34 (P.E.I.); the Water Authority Act had been substantially amended the previous year: (1970), 19 Eliz. II, c. 43 (P.E.I.).

151. *Ibid.*, ss. 3(1), 10.

152. *Ibid.*, s. 6.

153. *Ibid.*, ss. 3(4), 2(c).

154. *Ibid.*, s. 14.

155. *Ibid.*, s. 3(1), (2).

156. *Ibid.*, s. 4.

157. *Ibid.*, ss. 3(3), (4).

158. *Ibid.*, s. 7.

159. *Ibid.*, s. 8.

160. *Ibid.*, s. 9.

161. *Ibid.*, s. 13.

162. *Ibid.*, s. 12.

163. *Ibid.*, s. 11.

164. *Ibid.*, s. 5(a).

ments of Tourist Development, Public Works and Development, the Prince Edward Island Association of Mayors and Municipalities, the Prince Edward Island Tourist Association, the Prince Edward Island Fish and Game Association and such other persons as the Lieutenant-Governor in Council may determine.¹⁶⁵ The Lieutenant-Governor in Council may designate a chairman and vice-chairman, and authorize payments of *per diem* allowances and expenses.¹⁶⁶

The Lieutenant-Governor in Council may also appoint local advisory boards who are responsible to the Commission.¹⁶⁷

Finally, the Lieutenant-Governor in Council may establish a Water Management Agency as a body corporate, appoint such members to it as he deems necessary, prescribe its terms of reference, the remuneration of its employees, and establish specific projects for it.¹⁶⁸ The purpose of the agency is to plan and conduct programmes for the more efficient management of water resources, but it must submit its proposals to the Commission and is not to implement them until approved by the Lieutenant-Governor in Council.¹⁶⁹

The powers given the Commission ensure it considerable control over water resources and pollution and the coordination of policies in this regard. Most important is the Commission's power to exercise exclusive control of the use of all surface, ground and shore water, the allocation and use of water, pollution within the jurisdiction of the province, and the alteration of the natural features of any watercourse or lake and the natural movement of water therein.¹⁷⁰ These powers may be exercised notwithstanding any provincial law, statutory or otherwise, or any grant, deed or transfer heretofore made, whether by the Crown or otherwise, or any possession, occupation, use or obstruction or any use of water by any person for any time whatever.¹⁷¹ "Watercourse," it should be observed, includes every watercourse and every source of water supply, whether it usually contains water or not, and the bed and shore of every stream, river, lake, pond, creek, spring or gulch.¹⁷² "Pollution" means any alteration or variation of the physical, chemical, biological or aesthetic properties of land, air or water that results or may result from any act or omission within provincial jurisdiction.¹⁷³

Again the Commission is empowered to enquire into any activity or situation that causes or appears to or may cause pollution; consider and prepare anti-pollution programmes; coordinate the work of departments and other provincial agencies and officers respecting any matter relating to pollution control; cooperate with any public or private body or person in any matter relating to pollution control; require any provincial department, agency or officer to investigate and report on any matter related to pollution; and perform such other duties as may be assigned to it by the Lieutenant-Governor in Council.¹⁷⁴ More-

165. *Ibid.*

166. *Ibid.*, ss. 5(b), (c).

167. *Ibid.*, s. 5(d).

168. *Ibid.*, s. 5(e), (f).

169. *Ibid.*

170. *Ibid.*, s. 15(1)(e).

171. *Ibid.*

172. *Ibid.*, s. 2(h).

173. *Ibid.*, s. 2(e).

174. *Ibid.*, s. 15.

over, the Lieutenant-Governor in Council, or any one authorized or delegated by him,¹⁷⁵ may enter into agreements with the Government of Canada or its agencies or with a corporation for cooperating in acquiring, constructing or operating purification systems or sewage works for assisting in the development or expansion of an industry. Where the capacity and facilities of such systems or works are sufficient to permit their use by others, this may be done.¹⁷⁶

In addition to these general powers of the Commission, the Act contains a number of specific provisions respecting pollution. Where pollution that is harmful to the public health, safety or welfare has occurred or is likely to occur by reason of any act or omission, the Minister may direct the Commission to investigate and report.¹⁷⁷ If the Commission recommends that it is in the public interest to have the situation remedied, it may, if the Minister approves the report, by order require any person, including any provincial department or agency, to take remedial action to combat, eliminate or investigate the cause of pollution.¹⁷⁸ For failure to comply a person, other than such department or agency, is liable to a fine of not less than \$100 and not more than \$5,000 and to ninety days imprisonment on default, as well as a penalty of up to \$1,000 for each day he fails to take the required action.¹⁷⁹ The Commission may itself take any remedial action required to combat, eliminate or mitigate a cause of pollution, and if this is necessitated by the failure of a person to comply with an order described above, it may recover costs and expenses against the person who failed to comply with the order.¹⁸⁰ The Commission, through its authorized officers, employees or experts, may examine any water in the province to ascertain the degree of pollution and its cause and enter any premises for the purpose; any person who obstructs such entry and inspection is guilty of an offence and is liable to a fine of not less than \$50 and not more than \$200, and to thirty days imprisonment on default.¹⁸¹ Again, no person may discharge or deposit any material into any well, reservoir or other water or watercourse or on any shore or bank, or into any place that may cause pollution or impair the quality of water, unless approved by the Commission.¹⁸² Moreover, the Commission may make regulations pertaining to all operations involving water pollution,¹⁸³ and it may by regulation of the Lieutenant-Governor in Council be empowered to exercise any power respecting water pollution conferred on any Minister or officer of the Crown.¹⁸⁴

A number of provisions deal with municipal and industrial purification systems. "Purification system" is defined to include any plant or installation used, or designed to be used, for the improvement of the physical, chemical, biological or aesthetic properties of land, air or water.¹⁸⁵ The Commission may, with the authorization of the Lieutenant-Governor in Council, pay a portion of the cost

175. *Ibid.*, s. 30(1).

176. *Ibid.*, s. 30(2).

177. *Ibid.*, s. 16(1).

178. *Ibid.*, s. 16(2).

179. *Ibid.*, s. 16(4), (5).

180. *Ibid.*, s. 17.

181. *Ibid.*, s. 18(1).

182. *Ibid.*, s. 19.

183. *Ibid.*, s. 20.

184. *Ibid.*, s. 22.

185. *Ibid.*, s. 2(g).

of preparing plans for purification systems to serve the territory of two or more municipalities,¹⁸⁶ and a subsidy may, on the recommendation of the Commission, be granted by the Lieutenant-Governor in Council to any municipal corporation or industry that undertakes a water purification system either alone or with another.¹⁸⁷ A municipal corporation wishing to avail itself of the provisions of Part VIB of the National Housing Act providing for loans for municipal sewage treatment projects must previously have the plans of its works approved by the Commission.¹⁸⁸ Again, when a municipality or person contemplates the establishment or extension of, or change in any purification system, the plans and specifications and an engineering report of the work must be approved by the Commission before the work is undertaken.¹⁸⁹ This approval is subject to such conditions as the Commission deems necessary.¹⁹⁰ If such work is undertaken without the approval of the Commission, it may order an investigation of the purification system and of the person undertaking the work at the expense of such person, and may order such changes to be made as it deems necessary.¹⁹¹ Where in the opinion of the Lieutenant-Governor in Council, a joint, combined or inter-connected purification system is feasible and desirable, then the Commission may by order require that it be inter-connected.¹⁹² Finally, purification systems must be maintained, repaired and operated in such manner and with such facilities as the Commission directs.¹⁹³

A number of provisions deal with sewage and water works. Where the Commission finds it necessary that a public utility (which includes any person engaged in constructing, altering, extending, managing or controlling any purification system)¹⁹⁴ locate any portion of a sewage or water works on private property and no agreement can be reached with the owner, the Commission may, with the approval of the Lieutenant-Governor in Council, permit the public utility to enter the property, locate any portion of the works there, and have access at all times for repairing, operating or maintaining the work without doing unnecessary damage; this permission may be granted subject to such terms and conditions and payment of such compensation as the Commission deems just.¹⁹⁵ The Commission may also, with the approval of the Lieutenant-Governor in Council, enter, take or expropriate any land it deems necessary for its undertakings or that of a public utility in relation to the use, construction, maintenance and repair of any such undertaking, and the Expropriation Act applies *mutatis mutandis*.¹⁹⁶

The Lieutenant-Governor in Council may create and incorporate bodies to construct and operate water or sewage works, make provisions respecting their names, composition, functions and membership, and exempt them in whole or in

186. *Ibid.*, s. 23.

187. *Ibid.*, ss. 24, 25.

188. *Ibid.*, s. 26.

189. *Ibid.*, s. 27(1).

190. *Ibid.*, s. 27(3). This is now R.S.C., 1970, c. N-10, Part VIII; formerly (1953-4) 2 & 3 Eliz. II, c. 23, Part VIB, as enacted by (1960-61), 9 & 10 Eliz. II, c. 1, s. 7, as amended.

191. *Ibid.*, s. 27(2).

192. *Ibid.*, s. 27(4).

193. *Ibid.*, s. 27(5).

194. *Ibid.*, s. 2(f).

195. *Ibid.*, s. 28(1).

196. *Ibid.*, s. 28(2).

part from the provisions of the Public Utilities Act.¹⁹⁷ A corporation so constituted may acquire, establish, alter, extend, manage and operate such works; supply water to persons and municipalities; receive, treat or dispose of sewage from persons or municipalities; agree with municipalities or persons respecting the operation of such works, the supply of water or sewage reception, treatment and disposal; acquire and hold real and personal property; engage personnel; finance its undertakings with the approval of the Lieutenant-Governor; assess and collect charges and fees; operate water and sewage works for government, municipalities or other persons; and perform such functions or duties as may be prescribed by the Lieutenant-Governor in Council.¹⁹⁸

The Commission is also charged with the exercise of powers under the regulations made pursuant to the Public Health Act respecting sewers and installations for treating sewage.¹⁹⁹

The Commission also has jurisdiction respecting wells. No one may make a well or hole in the ground for the purposes of obtaining water without its permission, and this permission may be cancelled or its terms and conditions altered after it is issued.²⁰⁰

A few other provisions of the Act may be noted. A department, agency or officer of the province affected by an order of the Commission under the Act may appeal to the Lieutenant-Governor in Council for a ruling to determine whether and to what extent the order applies.²⁰¹ The Minister may designate analysts, and the certificate of an analyst of the result of his analysis of a sample submitted by an official or employee of the Commission is admissible in evidence in prosecutions under the Act and, in the absence of evidence to the contrary, is proof of the statements therein.²⁰² Finally, the Lieutenant-Governor in Council has a general power to make regulations to give effect to the Act.²⁰³

Agricultural Chemicals Act

The Agricultural Chemicals Act which is to come into force on proclamation, may affect water in several ways.²⁰⁴ In particular it contains a number of provisions dealing specifically with water. Thus a person who keeps, stores or transports an agricultural chemical (which includes fertilizers, pesticides, plant growth regulators and soil supplements)²⁰⁵ must ensure that it does not come in contact with or contaminate food or drink for humans, animals or plants and must prevent them from coming into contact with humans, animals or plants in a manner that may be injurious to life.²⁰⁶ It also contains several prohibitions regarding open bodies of water, an expression defined to mean lakes, sloughs, rivers, bays, shorewaters, creeks, brooks or streams and any other waters so defined by regulations.²⁰⁷ Thus a person is prohibited from applying a pesticide in an open body of water

197. *Ibid.*, s. 29(1).

198. *Ibid.*, s. 29(2).

199. *Ibid.*, s. 21.

200. *Ibid.*, s. 27(6), (7).

201. *Ibid.*, s. 31.

202. *Ibid.*, s. 18(2), (3).

203. *Ibid.*, s. 33.

204. (1971), 20 Eliz. II, c. 1, s. 24 (P.E.I.).

205. *Ibid.*, s. 2(a).

206. *Ibid.*, s. 5(1).

207. *Ibid.*, ss. 2(h), 21(p).

unless he holds a permit under the regulations.²⁰⁸ Again, a person is prohibited from washing or submerging any apparatus, equipment or container used in holding or applying a pesticide in any body of water, or causing water from an open body of water to be drawn into any apparatus or equipment used for mixing or applying a pesticide within seventy-five feet.²⁰⁹ Finally, regulations may prohibit or restrict the washing in any open body of water of any equipment or apparatus used to hold an agricultural chemical or the drawing up of water from an open body of water into such equipment or apparatus.²¹⁰ An offence is punishable by a fine not exceeding \$1,000, imprisonment for ninety days, or both.²¹¹

The Minister of Agriculture and Forestry may also prohibit or restrict the sale, handling, use or distribution of water or cause it to be rendered harmless if he considers that it is contaminated by an agricultural chemical.²¹² Powers are given inspectors to take samples of water for analysis on any premises other than private dwellings at any reasonable time.²¹³ So far as private dwellings are concerned, a justice of the peace may, if it appears that there are reasonable and probable grounds for believing that a private dwelling house within his territorial jurisdiction contains water contaminated by an agricultural chemical or anything that affords evidence of a violation of the Act, issue a warrant permitting a peace officer, with or without an inspector, to enter and search the house therefor in the manner described in the Act, and if anything just mentioned is found the inspector may deal with it in the same manner as items found in other places.²¹⁴

Other Statutes

A new statute, the Sea Plants Act, which is to come into force on proclamation, provides for regulating the harvesting or marketing of sea plants and sea plant products.²¹⁵ Under the Act, the Lieutenant-Governor in Council may make regulations, *inter alia*, providing for the conservation of sea plants, the methods of harvesting them, licensing establishments and persons harvesting them and the fee therefor, exempting certain classes of persons who harvest them for purposes other than processing or resale, prescribing grades, quality and standards, respecting the inspection of sea plants, prescribing the requirements for the equipment used in connection with harvesting them, prescribing the manner of taking samples of sea plants, and prescribing a procedure for appeals.²¹⁶ Violations of the regulations are punishable by a minimum fine of twenty dollars for persons and one hundred dollars for associations and companies and a maximum fine of one hundred and five hundred dollars, respectively.²¹⁷

208. *Ibid.*, s. 7; see also s. 21(a).

209. *Ibid.*, s. 10.

210. *Ibid.*, s. 21(n) (iii).

211. *Ibid.*, s. 22.

212. *Ibid.*, s. 13.

213. *Ibid.*, s. 18.

214. *Ibid.*, s. 19.

215. (1970), 19 Eliz. II, c. 47, s. 6 (P.E.I.).

216. *Ibid.*, s. 3; for definitions of "harvesting" and "sea plants", see *ibid.*, s. 2(d), (k).

217. *Ibid.*, s. 5.

Brief mention may be made of a few relevant provisions of the Oil, Natural Gas and Minerals Act, 1971.²¹⁸ These include those relating to offshore drilling.²¹⁹ Again the Minister administering the Act may control and regulate the production of water by proration and prohibition,²²⁰ and he may also make provision regarding the escape of water.²²¹

NOVA SCOTIA

Tidal Power Corporation Act

A recent Nova Scotia statute establishes the Tidal Power Corporation.²²² The Corporation consists of a Board of Directors comprised of a Chairman and four to six other directors appointed by the Lieutenant-Governor in Council.²²³ The object of the Corporation is to obtain for the province the maximum benefit that may be derived from the exploitation of tidal power and undertakings ancillary to, connected with or arising as a result of such exploitation.²²⁴ In carrying out its objects the Corporation may promote the development of tidal power either alone or in conjunction with other governments, corporations or persons; undertake studies either alone, or with the approval of the Lieutenant-Governor in Council, in conjunction with other governments, corporations or persons with the approval of the Lieutenant-Governor in Council, enter into agreements with any person, or with any agency of Her Majesty in right of Canada or Nova Scotia or any other province respecting construction, planning, engineering or undertakings relating to development and use of tidal power or the generation, distribution and sale of electric power; and do such other things as it deems incidental or conducive to the attainment of its objects.²²⁵

The Corporation is given all the powers of a company under the Companies Act.²²⁶ It may also acquire, hold and dispose of land and other property.²²⁷ And land may be expropriated under the Expropriation Act when the Minister (i.e., the President of the Executive Council)²²⁸ deems it necessary for implementing a provincial obligation or attaining the object of the Corporation.²²⁹ Land, it should be observed, includes not only any right, title and interest to land, but to water and air as well.²³⁰

The Act is rounded out by provisions respecting the directors, officers and employees of the Corporation and its workings. In particular the Corporation must make an annual report to the Minister which is to be laid before the House of Assembly.²³¹

218. (1971), 19 Eliz. II, Bill No. 22 (P.E.I.); see, in addition to the provisions discussed in the text, ss. 3 "enter and use", "well", 88(a), 93.

219. See *ibid.*, s. 39(3).

220. *Ibid.*, s. 86(e).

221. *Ibid.*, s. 91.

222. (1970-71), 19 & 20 Eliz. II, c. 21 (N.S.).

223. *Ibid.*, ss. 3(1), 4.

224. *Ibid.*, s. 11.

225. *Ibid.*, s. 12.

226. *Ibid.*, s. 13.

227. *Ibid.*, s. 14(1).

228. *Ibid.*, s. 1(d).

229. *Ibid.*, s. 15.

230. *Ibid.*, s. 14(2).

231. *Ibid.*, s. 23.

Other Statutes

A few other statutes may be mentioned. An Act relating to Sewers and Sewage in the Areas Annexed to the City of Halifax has been repealed.²³² And the new Dartmouth City Charter gives that City the usual municipal powers respecting water and sewage.²³³

NEWFOUNDLAND

Clean Air, Water and Soil Authority Act

The most important recent statute respecting water in Newfoundland is the Clean Air, Water and Soil Authority Act, 1970.²³⁴ So far as its application to water is concerned, however, it is in general merely a re-enactment, with changes mostly of an administrative nature, of the Water Resources and Pollution Control Act, 1966-67.²³⁵ Consequently the following discussion will be limited to the more important changes.

The first series of modifications relate to changes in administrative responsibilities. The first such change is in the responsible Minister, who is now the Minister of Mines, Agriculture and Resources (no longer the Minister of Economic Development), though another may be designated.²³⁶ Secondly, the Water Authority is replaced by the Newfoundland and Labrador Clean Air, Water and Soil Authority, whose membership consists of the Deputy Minister or other designated official from the Departments of Mines, Agriculture and Resources, Health, Fisheries, Economic Development, and Municipal Affairs and Housing, and not less than two and not more than six other members appointed by the Lieutenant-Governor in Council.²³⁷ The Advisory Board is replaced by the Advisory Commission on Environmental Quality, which consists of not less than fifteen and not more than twenty-five members, including representatives of the Departments just mentioned.²³⁸ Similarly, local advisory boards are replaced by local advisory commissions.²³⁹ The control of the use, allocation and pollution of water and of the alteration of bodies of water formerly vested in the Authority is now vested directly in the Minister.²⁴⁰ Finally, under the Water Resources and Pollution Control Act it was required that the joint approval of the Minister of Economic Development and the Minister of Health was required for the establishment or extension of waterworks and the former Minister could require alterations or additions to waterworks if in his opinion it required alteration or in the opinion of the Minister of Health the water therein was a menace to public health; under the new Act only the Minister responsible for the Act, i.e. the Minister of Mines, Agriculture and Resources, need approve the establishment or alteration, and it is he, not the Minister of Health, who must be satisfied that the quality of water in waterworks is polluted or unwholesome.²⁴¹

232. (1970-1), 19 & 20 Eliz. II, c. 84 (N.S.).

233. (1970) 19 Eliz. II, c. 89, ss. 139(n), 162(b), (c), 239(e), 247-9 (N.S.).

234. 1970, No. 81 (Nfld.).

235. 1966-7, No. 57 (Nfld.).

236. 1970, No. 81, s. 2(i) (Nfld.).

237. *Ibid.*, s. 4(1), (2).

238. *Ibid.*, s. 5(1).

239. *Ibid.*, s. 5(2).

240. *Ibid.*, s. 17.

241. *Ibid.*, s. 18(1), (4); cf. 1966-7, No. 57, ss. 22(1), (4), (Nfld.).

The most important new substantive provisions in the Act are those relating to "stopping orders." When the Minister receives a report from the Authority, the Commission or a local advisory commission of a condition that causes or is likely to cause pollution, he may make such order as he considers necessary to protect the environment therefrom and to prevent, restrict or prohibit any activity that in his opinion gives rise or is likely to give rise to such condition, and may make an order stopping any works or operations either permanently or for such period as may be specified in the order.²⁴² Within forty-eight hours after making such order, the Minister must have a copy served on the owner or person in charge of the works or operations affected together with a statement showing the reasons for making the order, and thereupon the owner or person in charge is required to ensure that the works or operations are stopped.²⁴³ The owner or a person aggrieved may, within sixty days in the case of a permanent order, and in the case of a temporary order at any time during the period of stoppage, appeal to a judge of the Supreme Court in the manner specified in the Act.²⁴⁴ The judge on hearing the appeal may uphold or revoke the order and make such other decision as he considers proper.²⁴⁵ From this decision an appeal lies to the Supreme Court.²⁴⁶

Another new provision relates to applications to the Authority for the construction of sewage, industrial and processing works, hydro-electric power projects, control dams, river or drainage diversions or other alterations to the flow of water. The former provisions concerning these have been re-enacted,²⁴⁷ but it is further provided that after the Authority has considered the plans, specifications, reports and other information required with the application, it shall report with recommendations to the Minister, who may, after considering these as well as any regulations relating to the quality, properties and treatment of sewage or standards of emission for gaseous and particulate substances, as the case may be, approve the construction, and such approval may be given subject to such terms and conditions as may be warranted by the foregoing considerations.²⁴⁸

Other Statutes

Another re-enacted statute is the Waste Material (Disposal) Act, which provides for the disposal of waste and the regulation of dumping grounds in areas designated by the Minister of Mines, Agriculture and Resources.²⁴⁹ The Act expressly provides that in case of conflict with the Waters Protection Act, the Clean Air, Water and Soil Authority Act or the Health and Public Welfare Act and any regulations thereunder, these other Acts prevail.²⁵⁰

The provisions of the Crown Lands (Mines and Quarries) Act, 1961 relating to the removal of rock, sand and gravel from beaches were re-enacted

242. *Ibid.*, s. 24(1).

243. *Ibid.*, s. 24(2).

244. *Ibid.*, s. 25(1)-(4).

245. *Ibid.*, s. 25(5).

246. *Ibid.*, ss. 25(6), (7).

247. *Ibid.*, ss. 20, 23; cf. 1966-7, No. 57, ss. 24, 27 (*Nfld.*).

248. *Ibid.*, ss. 20(3), 23(2).

249. 1970, No. 82 (*Nfld.*).

250. *Ibid.*, s. 16.

in 1971.²⁵¹ Under these amendments “beach” is more precisely defined so that the prohibition against removal applies to lands lying within a horizontal distance of 1,000 feet from and within an elevation of 50 feet above ordinary low water mark of tidal waters; the definition also makes certain that permits to take such rocks do not apply to privately owned lands.²⁵¹ The amendments also make clear that the prohibition and Ministerial permits to remove these substances are subject to grants, leases or licences from the Crown.

The offence of contaminating domestic water in section 7 of the Waters Protection Act was somewhat reworded in 1970 to provide that any person who wilfully or negligently puts or allows to pass into a well, spring or other source of water supply used by any person any substance or thing whereby such source of water supply is damaged or the water supply rendered less wholesome or fit for domestic use is guilty of an offence.²⁵²

The Pesticides Control Act, 1970, contains a number of provisions affecting water.²⁵³ Thus a person is prohibited from applying a pesticide or herbicide in any open body of water except in accordance with the terms and conditions of a permit issued pursuant to regulations and the Act.²⁵⁴ Washing or submerging any apparatus, equipment or container used in holding or applying a pesticide or herbicide in any open body of water is also prohibited.²⁵⁵ An “open body of water” is defined as a pond, lake, river, creek, brook or stream and any other water prescribed by regulations.²⁵⁶ Again, if water is shown on inspection and analysis to be contaminated by a pesticide or herbicide, the Minister of Mines, Agriculture and Resources may, by order, prohibit or restrict its sale, handling or distribution, either permanently or for such time as he deems necessary, or have it destroyed or rendered harmless; no person is entitled to compensation for any such action.²⁵⁷ Power is given inspectors to take samples of water for analysis.²⁵⁸

The Public Utilities Act is also amended in relation to a matter dealing with water.²⁵⁹ By virtue of the amendment, section 61 now provides that where an industrial corporation uses water, whether supplied or collected by itself or another, and furnishes it to any community associated or adjacent to its operations, not as a primary business but as a convenience to the public not otherwise served and that is not in competition with a public utility whose primary business is to furnish water, the Board of Commissioners of Public Utilities may exempt such corporation from any of the provisions of the Act or fix by agreement with the corporation an arbitrary rate to be charged to the public. The intent of this provision is to facilitate the common action of industrial corporations in supplying water to communities connected with them pending the establishment of ordinary public utilities, and the Board is required to interpret it accordingly.

251. 1970, No. 27, s. 2, re-enacting 1961, No. 1, s. 88 (Nfld.).

252. 1970, No. 78, s. 2, re-enacting 1964, No. 36, s. 7 (Nfld.).

253. 1970, No. 80 (Nfld.).

254. *Ibid.*, s. 10(2).

255. *Ibid.*, s. 10(1).

256. *Ibid.*, ss. 2(f), 22(1)(n).

257. *Ibid.*, s. 11.

258. *Ibid.*, s. 16(a)(ii).

259. 1970, No. 45, s. 7, re-enacting 1964, No. 39, s. 61 (Nfld.).

An amendment to the City of St. John's Act empowers the Council or the Mayor to declare a state of emergency if there is, *inter alia*, a flood, and to order the closing of businesses and places of entertainment, suspend shop closing regulations, restrict the use of streets by vehicles and impose a curfew.²⁶⁰

There have been minor amendments relating to water in the Provincial Parks Act.²⁶¹ Regulations may now be made for the use, care, preservation, improvement of, and safety in the parks, including rivers and lakes, regulating water traffic, and prohibiting the use of any defined class of boat.

Finally, an amendment to the Local Government Act changes a reference to the Water Resources and Pollution Control Act to the Clean Air, Water and Soil Authority Act.²⁶²

Statutory Agreements

A number of statutory agreements affecting waters have recently been amended by the following:

- (1) The Big Nama Creek Mines Ltd. (Amendment of Agreement) Act, 1971;²⁶³
- (2) The British Newfoundland Corporation Ltd. (Lower Churchill River Lease) (Amendment) Act, 1970;²⁶⁴
- (3) The British Newfoundland Exploration Ltd. Statute and Agreement (Amendment) Act, 1970;²⁶⁵
- (4) The Canadian Javelin Ltd. (Amendment of Agreement) Act, 1971;²⁶⁶
- (5) The Churchill Falls (Labrador) Corporation Ltd. (Lease) (Amendment) Act, 1970;²⁶⁷
- (6) The Flintkote Company Statutory Mining and Shipping Agreement (Amendment) Act, 1970;²⁶⁸
- (7) The Frobisher Ltd. (Confirmation of Agreement) (Amendment) Act, 1971;²⁶⁹
- (8) The Government-British Newfoundland Corporation Ltd.-N. M. Rothschild & Sons (Supplemental Agreement) Act, 1970;²⁷⁰
- (9) The Newfoundland Pulp & Chemical Co. Ltd. (Agreement) (Amendment) Act, 1970.²⁷¹

Finally, there are minor provisions dealing with wharf properties under agreements confirmed by the following statutes:

- (1) National Sea Products Ltd. (Grants and Subsidies) Act, 1971;²⁷²
- (2) The Noranda Exploration Co. (Ltd.) Agreement Act, 1971.²⁷³

260. 1971, No. 70, s. 2, enacting R.S.N., 1952 c. 87, s. 42A (Nfld.).

261. 1970, No. 65, s. 2 (Nfld.); re-enacting R.S.N., 1952, c. 49, s. 9.

262. 1971, No. 56, s. 6, amending 1966, No. 31, s. 69(1) (Nfld.).

263. 1971, No. 40 (Nfld.).

264. 1970, No. 70 (Nfld.).

265. 1970, No. 66 (Nfld.).

266. 1971, No. 36 (Nfld.).

267. 1970, No. 62 (Nfld.).

268. 1970, No. 63 (Nfld.).

269. 1971, No. 60 (Nfld.).

270. 1970, No. 49 (Nfld.).

271. 1970, No. 92 (Nfld.).

272. 1971, No. 11, Schedule (Nfld.).

273. 1971, No. 58 (Nfld.).

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